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The Limits of Minimal Diversity

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The Limits of Minimal Diversity

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INTRODUCTION

The proliferation of overlapping mass tort and other complex litigation arising from the same or a related series of transactions and occurrences has imposed significant burdens on both federal and state courts, and led to urgent calls for reform.[1] Commencing in the late 1970s, repeated bills were introduced in Congress providing for the maintenance in federal court of any civil action comprising multiple claims arising from the same transaction, occurrence, or course of conduct (or, in later versions, accident), provided that "minimal diversity" of citizenship existed between any two adverse parties in the action and certain other requirements were met. These proposals culminated in the passage of the Multiparty, Multiforum Trial Jurisdiction Act of 2002.[2] This expansion of federal jurisdiction is predicated on the assumption that the "complete diversity" rule articulated by Chief Justice Marshall in his early opinion in *Strawbridge v. Curtiss*,[3] which requires that each party in the action be of diverse citizenship from every adverse party, is only a statutory rather than a constitutional limitation that can be altered at will by Congress. The Multiparty, Multiforum Act also allows the removal from state court for potential consolidation with a pending federal action meeting the Act's requirements of state court actions that arise from the same acci-

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1. *See, e.g.*, *Multiparty, Multiforum Jurisdiction Act of 1989: Hearing on H.R. 3406 Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 52 (1989) (statement of Robert F. Hanley, ABA Mass Torts Commission); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990); ABA COMMISSION ON MASS TORTS, REP. NO. 126 TO THE ABA HOUSE OF DELEGATES (1989); AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS (1994) [hereinafter ALI REPORT]; Thomas D. Rowe & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 20 (1986). *But see* REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, 48–50 (1999) (cautioning against hasty reform and recommending further study).

2. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107–273, § 11020, 116 Stat. 1758, 1826 (2002).

3. 7 U.S. (3 Cranch) 267 (1806).

dent, even if the removed state court actions involve no diversity of citizenship at all.[4]

Similarly, in 1994 the ALI issued a report on complex litigation proposing legislation permitting the consolidation for all purposes, including trial, of dispersed litigation pending in federal court involving one or more common questions of fact, as well as the removal from state court of litigation arising out of the same "transaction or occurrence, or series of transactions or occurrences" as a pending federal action, even though none of the parties in the removed state court action was of diverse citizenship from any other party.[5] The ALI grounded federal jurisdiction over such removed actions primarily on the concept of "supplemental jurisdiction," but also invoked the concept of "minimal diversity" in support of its proposal. Again, the Institute proceeded on the assumption that the complete diversity requirement was of statutory, rather than constitutional, dimension.

Commencing in the mid-1990s and continuing to date, yet another push for federal jurisdiction expansion based on the "minimal diversity" concept surfaced in proposed federal class action jurisdiction legislation. That legislation would authorize the removal from state to federal court of any state court class action in which any member of the plaintiffs' class is of diverse citizenship from any defendant, subject to certain restrictions.[6]

The primary purpose of the Multiparty, Multiforum Act and of the ALI's proposal is to achieve judicial and litigant economy, as well as fairness to litigants, by preventing repetitive litigation and inconsistent outcomes resulting from multiple federal and state proceedings arising out of the same transactions or events.[7] The class action jurisdiction proposal shares those objectives. However, it also is based on congressional findings that state courts are not well equipped to resolve large-scale class action litigation having interstate aspects, and that such state class actions not only have resulted in settlements that are unfair to class members, but have subjected business defendants to unfair settlement pressure.[8]

This Article examines the origins and validity of the pivotal assumption underlying these federal jurisdiction expansion enactments and proposals. They rest on the view that the presence of "minimal diversity" found somewhere in an aggregation of claims whose joinder is authorized

4. *See infra* Part I.C.
5. *See infra* Part I.B.
6. *See infra* Part I.D.
7. *See infra* text accompanying notes 32–48, 67–68.
8. *See infra* text accompanying notes 82–94.

by the rules that Congress or the rules drafters may adopt satisfies the constitutional requirement for federal jurisdiction over the entire action. Part I reviews the recent enactments and proposals and their supporting rationales in more detail. Part II examines the U.S. Supreme Court's important interpleader decision in *State Farm Fire & Casualty Co. v. Tashire*,[9] in which the Court, for the first time, explicitly endorsed the concept of "minimal diversity" in defining the constitutional scope of the Diversity Clause of Article III.[10] The Article concludes that *Tashire* does not support the expansive applications of the minimal diversity thesis underlying the more recent proposals for enlargement of federal jurisdiction.

Part III advances three models under which the constitutional limits of the Diversity Clause might be analyzed. Under the first, "delegation" model of federal jurisdiction, the scope of the federal diversity "controversy" would be defined by whatever rules of party and claim joinder that Congress and the rules drafters might adopt, provided only that some claim in the action falls within the scope of Article III, without further analysis of whether the joinder of those claims serves the purposes underlying the limited grants of federal judicial power. The second, "historic" model of federal diversity jurisdiction would seek to support the joinder in a federal action of non-diverse state law claims that otherwise would fall outside the jurisdiction of the federal courts by asking whether English courts of equity at the time the Constitution was adopted would have regarded purely legal claims not otherwise satisfying the requirements of equity jurisdiction as part of a single equitable "case" because of the inadequacy of the remedy at law. The third, "necessary and proper" model of federal jurisdiction would support the joinder in a single federal diversity action of jurisdictional and non-jurisdictional claims by asking whether the joinder of the non-diverse state law claims reasonably might be thought to serve the purposes underlying Article III's grant of federal jurisdiction over controversies between "Citizens of different States."[11] This Article concludes that only the third model satisfactorily defines the boundaries of Article III. Further, in view of the importance of maintaining the balance between federal and state judicial power embodied in Article III, such a necessary and proper analysis should focus on real, rather than imagined, grounds for the assertion of federal jurisdiction over non-diverse state law claims, and should require a discernable connection between the jurisdictional expansion at issue

9. 386 U.S. 523, 531 (1967).
10. U.S. CONST. art. III.
11. U.S. CONST. art. III, § 2, cl. 1.

and the purposes underlying the Constitution's limited grants of judicial power to the national government.

Part IV then evaluates the various federal jurisdiction expansion enactments and proposals under such a necessary and proper model and concludes that, in many of their applications, they present significant issues in terms both of congressional power to enact them, and the appropriateness of its doing so. This is particularly true of their expansive removal provisions, which dispense with any requirement that any intended beneficiary of the Diversity Clause seek to invoke federal jurisdiction, and, in some applications, dispense with any requirement that the removed state court action involve any diversity of citizenship at all.

Finally, Part IV also considers whether the enacted and proposed expansions of federal jurisdiction based on "minimal diversity" of citizenship might instead be sustained on the ground that the federal courts possess "supplemental" jurisdiction over non-diverse state law claims that arise out of the "same transaction or occurrence" as the diversity claims with which they are joined. This Article concludes that this alternative foundation for federal jurisdiction expansion also is inadequate to the extent that it relies on the formal presence of a "transactional relationship" among claims without inquiring whether joinder of the jurisdictional and non-jurisdictional claims on the basis of such a relationship is "necessary and proper" to achieve the purposes underlying Article III.

I. Recent Proposals for Expansion of Federal Jurisdiction in the Context of Mass Tort and Class Action Litigation

A. The Impetus for Reform: Diseconomies and Unfairness Attendant on Repetitive and Overlapping Federal and State Litigation of the Same Subject Matter

In 1986, building on a previous Department of Justice proposal for legislative action to address the problem of multiparty, multiforum litigation,[12] Rowe and Sibley published an influential article addressing what they termed "the problem of scattered litigation."[13] That work has provided an important foundation for subsequent proposals directed at the same basic concern, both in its description of the problem to be addressed and in its proposed solution to that problem by making "minimal

12. *See Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 and H.R. 2202 Before the House Comm. on the Judiciary, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 96th Cong. 158–62 (1979).

13. Rowe & Sibley, *supra* note 1, at 20.

diversity" the basis for federal jurisdiction over original and removed proceedings designed to avoid duplicative federal/state litigation.

As Rowe and Sibley described it, "the problem is the unavailability of any single forum in which to consolidate scattered, related litigation—a difficulty that is becoming more and more common given the increasing number of complex tort actions, such as those growing out of mass accidents and product liability claims."[14] Invoking Professor Chafee's aphorism that "the benefactor is he who makes one lawsuit grow where two grew before,"[15] they argued that "[t]he goal of reducing multiple litigation is itself hardly a controversial one," noting the economy of not litigating the same matter twice, and the reduction of inconsistent outcomes, whipsawing, and "uncoordinated scrambles for the assets of a limited fund" as benefits of such consolidated proceedings.[16] These concerns, they argued, had taken on "heightened urgency" as the incidence of dispersed mass tort and other complex litigation had increased.[17] These observations have proved to be prescient of the current litigation landscape in federal and state courts.

To resolve the problem, they proposed the enactment of a Multiparty, Multiforum Jurisdiction Act. The essence of the proposal was to abolish the long-standing "complete diversity" rule of *Strawbridge v. Curtiss*,[18] in cases that presented a prospect of dispersed litigation over the same subject matter, permitting federal jurisdiction in such cases to be based instead on the existence of "minimal diversity" between any two adverse parties in the action, provided that certain other conditions raising the prospect of dispersed litigation arising out of the same transaction were present.[19] Those conditions generally were met whenever "any defendant has a residence in a state other than the one in which a substantial part of the acts or omissions giving rise to the action oc-

14. *Id.* at 9.

15. Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932).

16. Rowe & Sibley, *supra* note 1, at 14–15.

17. *Id.* at 15.

18. 7 U.S. (3 Cranch) 267 (1806).

19. Rowe & Sibley, *supra* note 1, at 19, 49 (appendix setting forth proposed statute). The authors' proposal excluded cases in which such a dispersal of events and defendant residence did not exist on the ground that, in such cases, all litigation regarding the matter would likely be forced into a single state court, and that such cases would not present the problem of "scattered litigation" that was their central concern. They acknowledged that in such cases "vertical" dispersal of litigation between federal and state courts of the same state might take place. *Id.* at 25–26, 50–51. This exclusion may have resulted from Professor Rowe's view that general diversity jurisdiction should be abolished altogether, in which event such "vertical" scattering of litigation could not occur. Recognizing that the general grant of diversity jurisdiction might not be abolished, the authors suggested that a "special provision" might be adopted to deal with vertical dispersion. *Id.* at 50–51.

curred."[20] In Rowe and Sibley's view, dispersed litigation of the same subject matter was likely in such cases because defendants would be amenable to suit on the same transaction in more than one state, but the complete diversity rule prevented the joinder or consolidation of all such claims in federal court, where nationwide service of process could be authorized.[21]

Rowe and Sibley had no difficulty in concluding that their proposal was consistent with the limited subject matter jurisdiction of the federal courts. In their view, the U.S. Supreme Court's decision in *Tashire*[22] had established beyond debate that the complete diversity requirement of *Strawbridge* was "one of statutory construction only and not a constitutional limitation binding Congress."[23] Relying without further analysis on *Tashire*'s conclusion that federal interpleader jurisdiction based on minimal diversity was constitutional, they assumed that "no constitutional barriers" stood in the way of their proposed extension of federal jurisdiction.[24] The validity of that unelaborated conclusion provides the central focus of this Article.

Significantly in light of later enactments and proposals taking the same tack, Rowe and Sibley did not limit their proposed extension of the federal diversity jurisdiction to original or removed cases involving "minimal diversity" between at least two adverse parties to the action. Rather, they proposed to authorize removal by any party to a claim in an action pending in state court, even if it was based entirely on state law and was exclusively between citizens of the same state, provided only that it arose out of the "same transaction, occurrence, or series of related transactions or occurrences" as an action meeting the requirements of the statute already pending in federal court.[25]

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20. *Id.* at 26. The authors believed that this situation would exist whenever two defendants resided in different states, as well as where a defendant resided in one state and part of the acts or omissions giving rise to the claim occurred elsewhere. *Id.*

21. *Id.* at 19.

22. 386 U.S. 523 (1967)

23. Rowe & Sibley, *supra* note 1, at 22.

24. *Id.*

25. *Id.* at 55. Rowe and Sibley's proposed removal provision provided:

> Any party to a claim in an action pending in a State court that arises out of the same transaction, occurrence, or series of related transactions or occurrences as an action pending within the jurisdiction of the district courts under section 1367 of this title may remove that claim to the district court of the United States for the district and division embracing the place where such claim is pending even if the claim is not otherwise removable pursuant to this section.

Id. Rowe and Sibley justified allowing all parties to a claim to remove to federal court from state court without regard to party citizenship on efficiency grounds, stating that in some situations "a plaintiff could not have brought a federal action (in the absence of minimal diversity) and may have appropriately sued in state court, and it might be too cumbersome to sort out cases in which plaintiffs could and

A significant feature of the Rowe and Sibley proposal was its explicit recognition that it was, in many applications, not specifically designed to address the problem of prejudice against out-of-state litigants that was the central concern of the constitutional grant of diversity jurisdiction. However, the existence of "minimal diversity" nevertheless was thought to provide an adequate jurisdictional "hinge" to permit the achievement of unrelated efficiency goals. Many have echoed Rowe and Sibley's strong antipathy to duplicative and wasteful intra- and inter-system litigation (among and between federal and state courts) and advocated various legislative and judicial solutions to prevent it.[26]

Despite a broad consensus that strong measures are required to avoid overlapping federal and state litigation on efficiency grounds, an occasional dissident voice has emerged. For the most part, the debate has focused on issues of policy, but occasionally reservations have surfaced bearing on the extent of federal power to eliminate undesirable duplication through mandatory consolidation in federal court. Professor Richard Epstein raised early warnings in both respects in a commentary directed to a preliminary draft of the ALI's Complex Litigation Project, previously discussed.[27] On policy grounds, Professor Epstein argued that the ALI's proposal unduly impaired important fairness concerns and was likely to achieve far less in efficiency gains that its proponents believed.[28]

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could not readily have sued in federal court." *Id.* at 56. They also argued that "if removal is of claims rather than of actions, defendants with a monopoly on the right to remove might try to engage in tactical maneuvers involving removal of one claim on which they were sued but not another." *Id.* Thus, both plaintiffs and defendants should have the ability to remove claims that arise out of the same transaction or occurrence to federal court to avoid unfair manipulation by the defendant.

Rowe and Sibley also noted the impact of their proposed removal provision on § 1441(b)'s existing limitations on removal, recognizing that "[t]he draft's 'even if not otherwise removable' language would override existing § 1441(b)'s limitation on removal in diversity cases to those involving no home-state defendants." *Id.* However, they dismissed the policy behind § 1441(b), of protecting only out-of-state defendants, calling § 1441(b)'s limitation irrelevant "since our concern is not prejudice but scattered litigation." *Id.*

26. *See, e.g.*, authorities cited *supra* note 1. In a recent article, Professor Martin Redish advocated what he termed a "zero tolerance solution" to the problem of duplicative litigation. *See* Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000). Noting the burdens, waste, and potential harassment that result from overlapping federal and state litigation of the same subject matter, he criticized current restrictive interpretations of the Anti-Injunction Act and the abstention doctrines that, in most circumstances, prohibit federal courts either from enjoining duplicative state court litigation or, in the alternative, from abstaining in favor of the state proceedings. *Id.* at 1355–60. He proposed that "any and all intersystemic duplicative litigation [is] unacceptable" and that a federal court should be required in all cases either to enjoin duplicative state proceedings or abstain in their favor. *Id.* at 1361.

27. Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & Com. 1 (1990). *See also infra* text accompanying notes 32–56.

28. *See Epstein, supra* note 27, at 7–9, 15–18.

In his view, the ALI also had overstated the interest in consistent outcomes, failing to explain why different outcomes from identical lawsuits should be of concern.[29]

Finally, Professor Epstein cautioned that massive consolidation of non-diverse state court litigation of the kind contemplated by the ALI likely exceeded the scope of the diversity and federal question jurisdiction conferred on the federal courts by Article III.[30] Foreshadowing the focus of this Article, he noted that the proposal expanded the use of "minimal diversity" far beyond the concept of "necessity" that had given it birth, and observed that "Congress does not have the power to define the contours of a case in whatever way it sees fit, any more than it can expand federal jurisdiction as it sees fit."[31] These preliminary suggestions deserve much more attention than they have received to date. The pressing need for full consideration of the limits of minimal diversity has become even more imperative with the enactment of the Multiparty, Multiforum Act and the prospect that the proposed class action jurisdiction legislation may be enacted by the current Congress.

B. THE ALI PROPOSAL AND ITS POLICY AND JURISDICTIONAL JUSTIFICATIONS

In 1994, the ALI, building on the work of Rowe and Sibley and others, issued a report proposing a number of statutory revisions designed to address the problem of overlapping and duplicative federal/state litigation of the same subject matter.[32] The ALI based its recommendations on the conclusion that repeated litigation of common issues "unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system."[33]

The Report concluded that section 1407 of the Judicial Code,[34] which authorizes consolidation in a single federal court of multiple pending federal proceedings for pretrial purposes, had failed to provide "anything like a comprehensive solution for the complex litigation problem,"[35] both

29. In fact the outcome of a lawsuit depends not only on the facts and the law, but also on "a wide range of other factors, which at a minimum include the attitudes towards risk that the parties bring to the litigation and the strategic choices that the lawyers make in handling the case." *Id.* at 20.

30. *Id.* at 34–49.

31. *Id.* at 38.

32. ALI REPORT, *supra* note 1.

33. *Id.* at 7.

34. 28 U.S.C. § 1407 (2000).

35. ALI REPORT, *supra* note 1, at 9.

because it authorized consolidation for pretrial purposes only[36] and because it failed to provide a mechanism for consolidating overlapping litigation pending simultaneously in both federal and state courts.[37] Other existing devices, such as party joinder, class actions, and interpleader, were not well designed to deal with dispersed mass tort litigation on a comprehensive basis.[38] The drafters of the ALI Report regarded a new consolidation regime for the "units of a complex dispute" as essential to complex litigation reform. Although recognizing that consolidation could create problems of its own by becoming so unwieldy that it would generate no efficiency gains and by impairing litigant autonomy, the Report regarded these concerns as overdrawn.[39] Rather, it concluded that joinder through consolidation "can promote justice as well as efficiency by ensuring consistent court rulings and the fair division of limited funds."[40] The centerpiece of the ALI's proposal was a new procedure allowing for the consolidation of actions pending in two or more U.S. District Courts that involved "one or more common questions of fact," where "transfer and consolidation will promote the just, efficient, and fair conduct of the actions."[41] The decision to transfer and consolidate under the ALI's proposed flexible standard was to be made by a newly created Complex Litigation Panel composed of federal judges.[42]

The drafters of the ALI Report recognized that, standing alone, their proposal for consolidation of federal litigation involving common questions of fact would not solve the problem of inefficient dispersed litigation they sought to resolve. That was because claims arising out of a single event or transaction "frequently may be filed in both the federal and state court systems."[43] For that reason, the Report combined its proposed consolidation procedure with a procedure for removal from state

36. *See* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998) (holding that, although § 1407(a) authorizes civil actions with common issues of fact to be consolidated in any district court for pretrial proceedings, § 1404(a), allowing transfer of a case from one district court to any other where the case could originally have been brought for the convenience of the parties and witnesses, may not be invoked by the district court conducting the consolidated pretrial proceedings to assign transferred cases to itself for trial).

37. *See* ALI REPORT, *supra* note 1, at 21–23 (stating that § 1407 was designed to allow transfer of "related lawsuits pending in different federal district courts to a single district judge for pretrial proceedings" and that centralization under § 1407, combined with other statutory and procedural devices "often is clumsy and jurisdiction and venue restrictions may prevent complete unitary treatment of the individual cases").

38. *Id.* at 24–29 (describing the inadequacies of party joinder under existing rules 19, 20, 23, and 24 of the Federal Rules of Civil Procedure).

39. *Id.* at 18–19.

40. *Id.*

41. *Id.* § 3.01(a)(1), (2), at 37.

42. *Id.* § 3.02, at 62.

43. *Id.* at 217.

to federal court of state law actions arising from "the same transaction, occurrence, or series of transactions or occurrences as an action pending in the federal court," provided that they "share a common question of fact" with the federal action.[44] Such removal might be initiated by any party to the state court action or on certification of the state trial judge presiding over the action.[45] Decision to permit removal and consolidation with the federal action was to be made by the Complex Litigation Panel with reference to the criteria established by section 3.01 for consolidation and transfer of duplicative federal actions, and on consideration of whether removal would "unduly disrupt or impinge upon state court or regulatory proceedings or impose an undue burden on the federal courts."[46] Operation of the removal provision did not require that a federal "magnet" action already exist (although, when it did, the removal decision was said to be "easy"), but could be based on the pendency of a single overlapping federal action.[47] Most importantly, there was no requirement that the removed action fall independently within the federal arising under or diversity jurisdiction.

A central feature of the ALI's proposal for dramatic expansion of removal jurisdiction was to solve the problem of overlapping federal/state litigation by authorizing the removal of purely state law claims in which none of the adverse parties were of diverse citizenship. The commentary noted that the purpose of its proposal was *not* to protect non-citizens from prejudice, as in the normal diversity removal situation. Rather, "[i]n the dispersed litigation situation . . . the objective of removal is to increase the overall efficiency of the adjudicatory process and to foster fairness and justice to the litigants."[48]

The ALI gave short shrift to the issue of congressional power to provide for removal of non-diverse state law cases that were transactionally related to an existing federal action. It concluded that the presence of a federal action to which the removed state action would be "attached" and the requirement that the state action be "transactionally related" to the federal action "means that the assertion of [federal subject matter] jurisdiction over those actions is analogous to the court's supplemental jurisdiction powers" conferred by section 5.03 of the proposal.[49] Section 5.03 provided that the federal transferee court should have subject matter jurisdiction over any claim that arose from the same

44. *Id.* § 5.01(a), at 220–21.
45. *Id.* § 5.01(e), at 221–22.
46. *Id.* § 5.01(a), at 221.
47. *Id.* at 222.
48. *Id.* at 242.
49. *Id.* at 234.

transaction, occurrence, or series of transactions or occurrences as a claim transferred under section 3.01 or removed under section 5.01.[50] Invoking concepts of pendent and ancillary jurisdiction developed in such cases as *United Mine Workers v. Gibbs*[51] and *Owen Equipment & Erection Company v. Kroger*,[52] the comments asserted that such removed non-diverse state law claims formed part of the same "constitutional case" as the claims properly filed in federal court under federal question or diversity jurisdiction.[53] This conclusion is explored in greater depth below.

Later, however, the comments suggested a different foundation for asserting Article III jurisdiction over such cases. Unlike the current supplemental jurisdiction statute, which seeks to preserve the long-standing requirement of complete diversity in actions involving supplemental claims,[54] the ALI's proposal dispensed with any requirement for complete diversity of the parties in the consolidated federal action (and indeed, with any requirement for diversity at all in the removed action itself). The comments noted that the proposal "departs from the complete diversity rule" in favor of jurisdiction based on "minimal diversity"[55] (presumably between any two adverse parties in the consolidated proceedings regardless of the existence of diversity in the removed or transferred action itself). They argued that "because complete diversity *always* has been deemed a statutory, rather than a constitutional, limitation [citing *State Farm Fire & Casualty Company v. Tashire*], the decision

50. *Id.* § 5.03(a)(1), at 256. Section 5.03 also provides for supplemental jurisdiction over related claims for indemnification. *Id.* § 5.03(a)(2), at 256.

51. 383 U.S. 715, 725 (1966).

52. 437 U.S. 365, 377 (1978).

53. ALI REPORT, *supra* note 1, at 258. However, the drafters noted, without further analysis, that "[t]his is not to suggest that the jurisdiction proposed here is exactly coextensive with traditional ancillary and pendent jurisdiction caselaw because *the jurisdiction asserted in those contexts has been in single cases, where as supplemental jurisdiction under § 5.03 is being extended over consolidated cases.*" *Id.* at 258–59 (emphasis added).

54. *See* 28 U.S.C. § 1367(b) (2000). Scholars have recognized and debated the deficiencies and drafting ambiguities in section 1367. *See, e.g.*, Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991); Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 SETON HALL LEGIS. J. 157 (1994); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991); Darren J. Gold, *Supplemental Jurisdiction over Claims by Plaintiffs in Diversity Cases: Making Sense of 28 U.S.C. § 1367(b)*, 93 MICH. L. REV. 2133 (1995); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849 (1992); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109 (1999); Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991).

55. ALI REPORT, *supra* note 1, at 260.

to extend supplemental jurisdiction to this class of cases appears constitutional."[56]

C. THE MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2002

Although the ALI proposal itself has not resulted in legislative action, proposals aimed at the same general objective have been presented to Congress beginning as early as 1978, culminating in the enactment of the Multiparty, Multiforum Trial Jurisdiction Act of 2002.[57] These proposals, however, more closely resemble Rowe and Sibley's original proposal for a multiparty, multiforum jurisdiction act than the more encompassing ALI proposal.[58]

In its earlier versions, the Multiparty, Multiforum Jurisdiction Act broadly conferred original federal court jurisdiction over litigation involving minimal diversity arising in circumstances that might be expected to give rise to dispersed litigation challenging the same wrongful con-

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56. *Id.* (emphasis added) (citing State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967)). The Institute did give at least lip service to the important issues of federalism that its proposal involved. It noted that "simply to federalize these cases would represent a major intrusion on the current distribution of judicial business between federal and state courts," and, as previously noted, instructed the Complex Litigation Panel to consider "whether removal would unduly disrupt or impinge upon state court or regulatory proceedings" in determining whether it should be allowed as a matter of discretion. *Id.* at 217, § 5.01(a), at 221. However, the provisions and general tone of the proposal consistently subordinated federalism interests to those of judicial economy to be achieved through federal consolidation. Thus, where state court litigation was spread across several states, the comments argued that the interests of federalism should give way to the need for judicial economy and consistent outcomes.

> Although it may be argued that inconsistent results caused by the application of varying laws is an expected cost of maintaining the federal system, reducing inconsistencies when additional factors suggest that consolidated treatment of related cases is merited is a legitimate reason supporting removal. Indeed, the desire to avoid inconsistent findings on identical fact questions . . . is an important value to be fostered in order to encourage the public perception of the courts as reliable and just.

Id. at 232.

57. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020, 116 Stat. 1758, 1826 (2002). *See Federal Diversity of Citizenship Jurisdiction: Hearing on S.2094, S. 2389, and H.R. 9622 Before the House Comm. on the Judiciary, Subcomm. on Improvements in Judicial Machinery*, 95th Cong. 61 (1978) [hereinafter *1978 Hearings*]. These hearings were held to consider S. 2094, S. 2389, and H.R. 9622, which would have limited the scope Federal diversity of citizenship jurisdiction by not allowing a plaintiff to invoke diversity jurisdiction within a district where the plaintiff was a citizen, and to consider the value of diversity jurisdiction in general. *See id.* at 61. Alan B. Morrison, the director of the Public Citizen Litigation Group in Washington, D.C., advocated limiting diversity jurisdiction, but only if a multiparty litigation amendment was also passed. *Id.* at 179 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group, Washington, D.C.). At these hearings, Morrison, on behalf of the Public Citizen Litigation Group, presented a proposed amendment to the legislation then being considered, "which would create a separate section under Title 28 to deal with large-scale torts where the sole basis of jurisdiction would be diversity." *Id.* at 181 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group, Washington, D.C.).

58. *See supra* text accompanying notes 18–25.

duct.[59] As enacted in 2002, however, the Act was dramatically scaled back in an apparent effort to minimize its impact on state and federal jurisdiction, and thus to address federalism arguments that had been raised in opposition to its passage.[60] The Act limits its coverage to any civil ac-

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59. *See, e.g.*, Diversity Jurisdiction Reform and Multiparty Injury Jurisdiction Act of 1983, H.R. 3690, 98th Cong. § 4 (1983). The 1983 proposal is typical of earlier versions. The jurisdictional grant language of the 1983 Bill was as follows:

> The district courts shall have original jurisdiction of any civil action arising out of a single event, *transaction, occurrence, or course of conduct* that results in personal injury or injury to the property of twenty-five or more persons if the sum or value of the injury alleged in good faith to have been incurred by any twenty-five persons exceeds $10,000 per person, exclusive of interest and costs, and the action:
>
> (1) is between a plaintiff who is a citizen of a State and any defendants, so long as any defendant and any person injured in the event, transaction, occurrence, or course of conduct is a citizen of a State different from that of any plaintiff;
>
> (2) involves a party who is a citizen of a State and any adverse party which is a foreign state as defined in section 1603(a) of this title or who is a citizen or subject of a foreign state; or
>
> (3) any party is a citizen of a State and any adverse party is a citizen of a different State, and any other defendant resides in a different State.

Id. (emphasis added).

Once an action was properly pending in a district court in accordance with the above provision, any person injured in "the single event, transaction, occurrence or course of conduct which is the basis of the action brought shall be permitted to intervene as a party plaintiff in any such action even if the action could not have been brought originally in a district court by such person." H.R. 3690 § 4. The Bill further allowed "any defendant in such action who is also a defendant in a civil action brought in a state court based upon the same single event, transaction, occurrence or course of conduct which is the basis of the action brought in the district court" to "remove the action to the district court of the United States for the district and division embracing the place where such action is pending even if the action is not otherwise removable under section 1441." *Id.*

60. As multiparty, multiforum legislation has been introduced over the years various groups and individuals have opposed it on federalism grounds. The American Legislative Exchange Council criticized a version of the Bill introduced at the 101st Congress because it represented too much federalization of tort law; the benefits are not

> sufficient to justify either the denigration of the role of state judges that is inherent in an effort to shift tort litigation from state to federal court judges or the denigration of the public policies embodied in state common law and statutes governing personal injury litigation that is inherent in the effort to impose a single state's law on all issues arising out of a single mass disaster.

Multiparty, Multiforum Jurisdiction Act of 1989: Hearing on H.R. 3406 Before the House Comm. on the Judiciary, Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice, 101st Cong. 247 (1989) [hereinafter *1989 Hearings*] (letter from Samuel A. Brunelli, Executive Director, American Legislative Exchange Council to The Honorable Henry J. Hyde, Congressman (Nov. 22, 1989)).

Others also expressed concerns that the multiparty, multiforum legislation would be too great an encroachment on state power, arguing that how a state chooses to compensate its citizens in tort cases ought to be left up to the states. A witness at hearings held during the 101st Congress noted that, under the Bill, a "federal court could . . . dictate what happens between a plaintiff and defendant who are both citizens of the same state and yet are forced to accept substantive law which has no relevance to either of them." *Id.* at 251 (letter from Nicholas Gilman, P.C., Gilman, Olson & Pangia, Washington, D.C. to The Honorable Robert W. Kastenmeier, Congressman (Nov. 21, 1989)). "[I]f a state wishes to permit litigation in its own courts against its own citizens regardless of where the mass disaster occurred, this state interest and its 'sovereignty' to do so could be subverted by federal removal under"

tion involving "minimal diversity between adverse parties *that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location*," and where one defendant resides in a state different from that in which the accident took place, any two defendants reside in different states, or substantial parts of the accident occurred in different states.[61] The intent of the qualifications is to identify situations in which duplicative litigation arising from the same accident is likely to arise in more than one state. The statute continues to define corporate citizenship in the same manner as the general diversity statute,

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the proposed multiparty legislation. *Id.* (letter from Nicholas Gilman, P.C., Gilman, Olson & Pangia, Washington, D.C. to The Honorable Robert W. Kastenmeier, Congressman (Nov. 21, 1989)).

The Conference of Chief Justices of State Courts voiced concerns about the legislation at hearings for the Bill that was introduced at the 102d Congress, arguing that the Bill preempts state tort law, an area traditionally of state concern. *Multiparty, Multiforum Jurisdiction Act of 1991: Hearing on H.R. 2450 Before the Senate Comm. on the Judiciary, Subcomm. on Courts and Admin. Practice*, 102d Cong. 19 (1992) [hereinafter *1992 Hearings*] (letter from Robert N.C. Nix, Jr., President of the Conference of Chief Justices). The Conference felt that there was no evidence that state courts are not capable of handling large cases that arise out of a single accident and that such legislation "would interfere with the independence of state courts by authorizing bifurcated trials under which federal courts would determine the governing legal principles." *Id.* at 20. *See also id.* at 70, 75–76 (statement of Robert A. Sedler, Professor of Law, Wayne State University); 107 CONG. REC. H895 (Mar. 14, 2001) (statement of Rep. Sheila Jackson-Lee); 107 CONG. REC. H896 (Mar. 14, 2001) (statement of Rep. Watt).

Other witnesses commented that, although judicial efficiency is important, state sovereignty concerns override efficiency concerns. These witnesses argued that any litigation that seeks to consolidate such large actions should "balance the needs of the injured parties and the proper respect for State law and State courts against any efficiencies that might be achieved." *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1752 Before the House Comm. on the Judiciary, Subcomm. on Courts and Intellectual Prop.*, 106th Cong. 68 (1999) [hereinafter *1999 Hearings*] (statement of Brian Wolfman, Staff Attorney, Public Citizen Litigation Group). Although "these one-size-fits-all rulings are efficient to be sure, but they deprive parties of their State law rights and, in that respect, are an affront to Federalism because they are made without regard to differences among State laws." *Id.* at 69 (statement of Brian Wolfman, Staff Attorney, Public Citizen Litigation Group). Attorney Lee Kriendler stated, "we sometimes forget that this is a search for justice, and justice means the sensitive application of the right law, the sensitive application of the law of a State that has an interest in having its law applied. Now, that is important; that means something." *Id.* at 122 (statement of Lee S. Kreindler, Kreindler & Kreindler, New York, N.Y.).

61. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107–273, § 11020(b)(1)(A), 116 Stat. 1758, 1826 (2002) (emphasis added) (adding § 1369(a) to 28 U.S.C.). The Multiparty, Multiforum Trial Jurisdiction Act of 2002 also requires the district court to abstain from jurisdiction in any case in which a substantial majority of the plaintiffs are citizens of a single state of which the defendant also is a citizen and the claims asserted will be governed primarily by the laws of that state. *Id.* § 11020(b)(1)(A) (adding § 1369(b) to 28 U.S.C.). The 1999 Bill (H.R. 2112, 106th Cong. (1st Sess. 1999)), like earlier versions of the Multiparty, Multiforum bills contained detailed choice of law provisions. *See, e.g.*, Court Reform and Access to Justice Act of 1987, H.R. 3152, 100th Cong. (1st Sess. 1987); Multiparty, Multiforum Jurisdiction Act, H.R. 3406, 101st Cong. (1st Sess. 1989); Multiparty, Multiforum Jurisdiction Act, H.R. 2450, 102d Cong. (1st Sess. 1991). However, these provisions were removed from the most recent versions of the Bill. *See* Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act, H.R. 860, 107th Cong. (1st Sess. 2001).

under which a corporation is deemed a citizen of each state in which it is incorporated and of the state in which it has its principal place of business.[62] In addition to its basic provision for original district court jurisdiction, the Act also includes a provision for intervention of right in any litigation commenced under its provisions by any other plaintiff having a claim arising from the same accident, regardless of whether that plaintiff is of diverse citizenship from any defendant.[63] Of even greater import, it provides for removal from state court by any defendant who is

> a party to an action which is or could have been brought, in whole or in part, under [the proposed act] in a United States district court and arises from the same accident as the [removed action], *even if the action to be removed could not have been brought in a district court as an original matter.*[64]

In essence, the current Multiparty, Multiforum Act applies only to "a very narrowly defined category of cases," such as airplane accidents.[65] In view of its stringent limitations, the Act has evolved into a modest alteration of existing jurisdictional rules.[66] But the jurisdictional theories it espouses have broad implications, and equally would support enormous intrusions on the jurisdiction and functioning of the state courts, such as the ALI proposal and the much broader earlier versions of the Bill. For this reason, in depth examination of its underlying "minimal diversity" jurisdictional theory is essential. This is particularly so in light of the Act's broad provisions for intervention by parties having no diversity to any adverse party, and for removal of stand alone state court actions that involve no diversity of citizenship at all.

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62. Multiparty, Multiforum Trial Jurisdiction Act of 2002 § 11020(b)(1)(A) (adding § 1369(c)(2) to 28 U.S.C.).

63. § 11020(b)(1)(A) (adding § 1369(d) to 28 U.S.C.).

64. § 11020(b)(3)(B) (adding § 1441(e)(1) to 28 U.S.C.) (emphasis added).

65. H.R. REP. No. 106-276, at 21 (1999) (concurring minority views on H.R. 2112, 106th Cong. (1st Sess. 1999)). The Multiparty, Multiforum Trial Jurisdiction Act of 2002 was based on the legislative record and reports compiled in connection with earlier versions of the Bill. *See* H.R. CONF. REP. No. 685 (2002).

66. The minority views on House Bill 2112 by members of Congress who have strongly opposed broad class action reform on federalism grounds found its narrow provisions "an effective means by which to improve the manageability of complex litigation. In this narrow circumstance, we feel that there is sufficient justification to expand federal court jurisdiction." H.R. REP. No. 106-276, at 20. Although they

> generally oppose having federal courts decide state tort issues where complete diversity is not present . . . we also believe that in the narrow circumstance of single accident injuries with multiple parties from different states, there may be legitimate reasons to consolidate cases concerning the same accident in one federal forum. Litigating the same liability question several times over in separate lawsuits may waste judicial resources and may be costly to both plaintiffs and defendants.

Id. at 22.

Examination of the Multiparty, Multiforum Act is important for another reason. Unlike the proposed class action jurisdiction legislation, the drafters of the Act have made no real effort to tie its provisions to any recognized purpose of the diversity jurisdiction. They simply assumed that the U.S. Supreme Court's *Tashire* decision provided ample support for jurisdiction based on "minimal diversity." The Act itself, however, is not aimed at preventing local bias against out-of-state litigants or even at promoting "nationalization" by assuring a competent and neutral federal forum for multistate business enterprises conducting business away from home. Rather, the Act has been justified on the grounds of judicial efficiency. As the House Report on the 1999 version of the Bill pointed out, in the litigation it covers, such as a major airline disaster, repeated litigation of the same liability issue will occur if separate suits by different victims are maintained. "The waste of judicial resources—and the costs to both plaintiffs and defendants—of litigating the same liability question several times over in separate lawsuits can be extreme."[67] The proposed Bill was intended to "reduce litigation costs as well as the likelihood of forum-shopping in airline accident cases; and an effective one-time determination of punitive damages would eliminate multiple or inconsistent awards arising from multiforum litigation."[68]

D. The Class Action Jurisdiction Acts and Their Policy and Jurisdictional Justifications

In the mid-1990s, Congress began considering a somewhat different approach to complex litigation reform. These proposals focused not on multiforum, multiparty litigation as such, but rather on state court class actions which were thought by sponsors of the legislation to have been abused to the detriment of corporate defendants carrying on operations in many states.[69]

The most recent fully considered version of this legislation is the Class Action Fairness Act of 2003, which passed the House of Representatives on June 12, 2003 and is pending in the Senate.[70] The heart of the Bill is its proposal to permit the filing in federal court, or the removal

67. *Id.* at 6.

68. *Id.* at 7.

69. Class Action Fairness Act of 2003, H.R. 1115 and S. 274, 108th Cong. (1st Sess. 2003). For previous versions of the Bill, *see* Class Action Fairness Act of 2002, H.R. 2341, 107th Cong. (2002); Class Action Fairness Act of 2001, S. 1712, 107th Cong. (2001); Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong. (1999); Class Action Fairness Act of 1999, S. 353, 106th Cong. (1999); Class Action Jurisdiction Act of 1998, H.R. 3789, 105th Cong. (1998); Class Action Fairness Act of 1998, S. 2083, 105th Cong. (1998).

70. *See* H.R. 1115 and S. 274. At this writing, a proposed substitute, S. 1751, is pending before the Senate. The revisions made by S. 1751 do not affect the basic arguments advanced here.

from state court, of any class action[71] provided that any member of the class is of diverse citizenship from any defendant and the total matter in controversy exceeds the sum or value of $5,000,000 exclusive of interest and costs,[72] with certain exceptions.[73] These proposals again represent a repeal, in the class action context, of the "complete diversity" rule of *Strawbridge v. Curtiss*,[74] and assume that basing federal jurisdiction on the existence of such "minimal diversity" falls clearly within the scope of Article III.[75] They also overrule the U.S. Supreme Court's restrictive holding in *Snyder v. Harris* requiring each member of a federal diversity class action independently to satisfy the amount in controversy requirement (now $75,000) unless the interests of the class members are "common and undivided."[76] Additionally, where class actions meeting these relaxed jurisdictional requirements are filed in state court, the Bill allows any defendant, or, after class certification, any nonnamed member of the class, to remove the action without the concurrence of other defendants or class members.[77] This removal provision alters three long-standing provisions of the Judicial Code restricting removal only to defendants, requiring all defendants to join in the notice of removal, and providing that an action may not be removed from state to federal court if any defendant is a citizen of the state from which removal is sought. The validity of these fundamental changes in removal practice is discussed in greater depth below.[78]

Finally, the Act provides that if a class action originally filed in or removed to federal court under its provisions is determined by the federal district court not to satisfy the requirements for certification as a

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71. Section 4 of the Bill, which amends the general diversity statute by adding a new § 1332(d), defines "class action" to include any

> civil action filed in a District Court of the United States pursuant to rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed pursuant to a State statute or rule of judicial procedure authorizing an action to brought by one or more representative persons on behalf of a class.

H.R. 1115 § 4.

72. *Id.* § 4(a).

73. *Id.* (adding § 1332(d)(3) permitting the district court to decline jurisdiction where greater than one-third and less than two-thirds of the class members and the primary defendants are citizens of the State in which the action was filed; adding § 1332(d)(4)(A) excluding cases where two-thirds of the class members and the primary defendants are citizens of the State in which the action was originally filed; adding § 1332(d)(4)(B) excepting any action where the primary defendants are States, their officials, or other governmental entities "against whom the district court may be foreclosed from ordering relief"; adding § 1332(d)(4)(C) excepting actions in which the number of proposed class members is less than 100).

74. 7 U.S. (3 Cranch) 267 (1806).

75. *See* H.R. REP. No. 108-144, at 10 n.11 (2003).

76. 394 U.S. 332, 355 (1969).

77. H.R. 1115 § 5 (adding § 1453 to the Judicial Code).

78. *See infra* text accompanying notes 211–41.

class action under Rule 23 of the Federal Rules of Civil Procedure,[79] the court "shall dismiss" the action.[80] Although the statutory language is not entirely clear, it suggests that plaintiffs may refile their action in state court as either a class or individual action, but provides that such an action may again be removed to federal court if it meets the requirements for original federal jurisdiction, including, presumably, the newly relaxed jurisdictional requirements of the Act.[81]

The Act includes declarations of Findings and Purposes supporting its enactment,[82] which are fleshed out in the House Report. Primarily, it proceeds on the assumption that state court class actions recently have been subject to "abuses of the class action device"[83] that have harmed class members and defendants. Class members are thought to have been harmed by coupon settlements of little or no value accompanied by large fee awards to class counsel, by preferential awards to some plaintiffs at the expense of other class members, by confusing class notices disabling class members from understanding and exercising their rights, and by inadequate scrutiny of class actions and settlements by state courts.[84] Defendants are said to have been harmed by being "forced into settlements, in order to avoid the possibility of huge judgments that could destabilize their companies."[85] In an apparent attempt to establish a tie to the purposes of the diversity jurisdiction, the Act finds that state courts are handling class actions that "affect parties from many states," and those courts "sometimes [act] in ways that demonstrate bias against out-of-State defendants."[86] As discussed below, however, some of the most important aspects of the Act itself have no apparent link to the desire to protect out-of state defendants or businesses from the impact of local bias.[87] In particular, the Act makes no effort to modify the general definition of corporate citizenship for diversity purposes as including both the state of incorporation and the state of the corporation's principal place of business,[88] nor does it confine its removal authorization to out-of-state corporations or class members who might be thought to be subject to local bias.

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79. All further rule references are to the Federal Rules of Civil Procedure unless otherwise specified.

80. H.R. 1115 § 4 (adding new § 1332(d)(7)(A) to the Judicial Code).

81. *Id.* § 4(a) (adding new § 1332(d)(7)(B)). The Act also tolls both federal and state limitations periods on refiled claims under specified circumstances. *Id.* (adding new § 1332(d)(7)(C)).

82. *Id.* § 2. *See* H.R. REP. No. 108-144, at 6–22.

83. H.R. 1115 § 2(a)(2)(A).

84. *See id.* § 2(a)(3)–(5).

85. *Id.* § 2(a)(4)(C); § 2(a)(6).

86. *Id.* § 2(a)(5).

87. *See infra* text accompanying notes 211–47.

88. *See* 28 U.S.C. § 1332(c)(1) (2000).

In elaborating on these findings, the House Report broadly condemns the adequacy of state court class action procedures and process. It concludes that many state courts "employ very lax class certification criteria" and that they "approve settlements with little—if any—regard for class certification standards or the interests of class members."[89] The Report also concludes that permitting state class actions to proceed is inefficient because, when overlapping class actions are filed in federal court, they may be transferred to a single district for coordinated or consolidated pretrial proceedings, whereas no such mechanism is available for overlapping state class actions pending in more than one state.[90] The Report suggests that state courts simply are not up to the task of handling complex litigation.[91] It also argues that state courts hearing interstate class actions are inappropriately establishing "national policy" by applying their own laws to transactions in other states, thus "dictating the substantive laws of other states," or by misinterpreting the laws of those states.[92] The Report contends that "interstate class actions" are appropriately heard in federal rather than state court because they "affect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit."[93] It also argues that state court class action abuses "adversely affect interstate commerce, and undermine public respect for our judicial system."[94]

As discussed below, some of these concerns may, in appropriate circumstances, provide an appropriate basis for the conferral of federal diversity jurisdiction. Others, such as the desire to promote judicial economy (standing alone), the large size of the litigation, or the alleged incompetence of state courts to handle large scale class action litigation, are not, without more, sufficient to warrant the massive transfer of power from the state to the federal judiciaries that the Act seeks to effect. The core of the problem lies in the failure of the Act to tailor its jurisdictional provisions to the purposes underlying Article III's grant of diversity jurisdiction to the federal courts.

89. H.R. REP. No. 108-144, at 12 (2003).

90. *Id.* at 15.

91. *Id.* at 24 (arguing that state courts "have fewer resources for dealing with huge, complex cases, like class actions," and that state court judges "are not as familiar with" choice of law issues presented by complex cases as are federal judges).

92. *Id.* at 13–14, 26.

93. *Id.* at 7; *see also id.* at 20 (arguing that interstate class actions warrant access to federal courts because they typically have the most money in controversy, involve the most people and have the most interstate commerce ramifications).

94. *Id.* at 33.

II. THE *TASHIRE* DECISION

Both the pending class action proposal and Multiparty, Multiforum Act rely centrally on the U.S. Supreme Court's *Tashire* decision[95] in their assumption that the existence of "minimal diversity" between any two adverse parties in an action or—in the case of the Multiparty, Multiforum Act, in a group of related actions—provides the necessary "hinge" for the assertion of federal diversity jurisdiction. The holding of *Tashire* is far more limited.

Tashire was an interpleader case. No matter what model of federal jurisdiction might be adopted, the assertion of federal authority based on the existence of "minimal diversity" between any two adverse claimants to a single fund or stake plainly is justified. From an historic viewpoint, the concept of equitable interpleader to resolve conflicting claims to a single "stake" on the ground of the inadequacy of the remedy at law was well established at the time the Constitution was adopted.[96] From a necessary and proper standpoint, it seems clear that, provided any two adverse claimants to a single stake are of diverse citizenship, the purposes of the Diversity Clause would be served by permitting one of them to rely upon federal jurisdiction to resolve its dispute with the diverse claimant. That being so, in a case such as *Tashire*, involving multiple claimants asserting mutually inconsistent claims to the same fund or stake, the assertion of federal jurisdiction over all the claimants is necessary to permit the federal court to render a meaningful judgment, and to prevent practical prejudice to the non-diverse claimants. In this respect, *Tashire* falls directly in the line of Supreme Court decisions running back at least to *Freeman v. Howe*,[97] sustaining "ancillary jurisdiction" over

95. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967). *Tashire* considered the appropriate scope of an interpleader action arising out of potentially inconsistent claims to a limited insurance fund. *Id.* at 531–35.

96. *See* sources cited *infra* note 117.

97. 65 U.S. (24 How.) 450 (1860). In *Freeman*, the Supreme Court, in holding that a state court had no power to issue a writ of replevin with respect to property attached by a federal marshall as security for a judgment in a federal diversity action, rejected the contention of the plaintiffs in the state replevin action that the federal action provided them with no effective remedy because they were not diverse from the defendant in the federal action. The Court reasoned that their claims to the property would be "ancillary and dependent" to those in the federal action. *Id.* at 460. *See also* White v. Ewing, 159 U.S. 36, 38 (1895) (permitting federal receiver of insolvent corporation to sue non diverse debtors to collect the assets of the estate). *But see* Fulton Nat'l Bank v. Hozier, 267 U.S. 276, 280 (1925) (rejecting intervention of non diverse party in federal insolvency proceedings because there was no logical dependency between his claims and the insolvency proceedings). In *Hozier*, the court stated that

non-diverse claims that are logically dependent for their resolution on diversity claims properly before the federal court. Additionally, federal jurisdiction is particularly appropriate—and thus "necessary and proper"—in interpleader cases involving multiple claimants not all of which can be subjected to jurisdiction in any one state court because of constitutional limits on the assertion of jurisdiction over their persons.[98] In such cases, only a federal court, with its attendant power to serve process nationwide, can provide a forum for the disposition of the conflicting claims of diverse as well as non-diverse claimants to the stake.

Tashire thus involved the clearest case for the assertion of federal jurisdiction based on "minimal diversity," which perhaps makes the U.S. Supreme Court's very truncated analysis of the question of constitutional power more understandable. The Court's discussion consisted solely of the statement that "in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens."[99] This statement, however, should not be read, as the proponents of the class action jurisdiction proposal and the Multiparty, Multiforum Act appear to have done, to stand for the proposition that federal jurisdiction based on the existence of minimal diversity between any two adverse parties clearly is constitutional "in all contexts." *Tashire* must be read carefully in light of the limited context of necessity in which it arose, and the authorities on which it relied, in determining the extent to which it supports the recent sweeping proposals for the extension of federal diversity jurisdiction.[100]

> [t]he general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; *but no controversy can be regarded as dependent or ancillary unless it has [a] direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.*

Id. (emphasis added).

98. *See* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518, 522 (1916).

99. *Tashire*, 386 U.S. at 531.

100. The Supreme Court in *Tashire* supported its conclusion with a single footnote referencing the 1968 ALI Study of the Division of Jurisdiction between State and Federal Courts, THE AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1968) [hereinafter ALI STUDY]. 386 U.S. at 531 n.7. Supporting Memorandum A to that study had regarded the interpleader cases as the "authority closest in point" in upholding federal jurisdiction on the basis of minimal diversity. ALI STUDY, *supra*, at 432–33. Like the Supporting Memorandum, however, *Tashire* also referred to several other lines of authority in support of its endorsement of federal jurisdiction based on minimal diversity. These included class actions in which the named class representative, but not all members of the class, are of diverse citizenship from the defendant (*see* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921)), intervention of right by co-citizens of opposing parties (*see* Wichita R.R. & Light Co. v. Public Util. Comm., 260 U.S. 48 (1922)), and the now-repealed provisions providing for removal of an entire action from state court provided it contained a "separable controversy" or (as later amended), a "separate and independent claim or cause of action" falling within the diver-

III. CONSTITUTIONAL CONSTRAINTS ON THE SCOPE OF DIVERSITY JURISDICTION

Three theoretical approaches might support the aggregation in federal court of claims that fail to satisfy the jurisdictional requirements of Article III with those that do. Under a "delegation" approach, the Constitution's conferral of federal judicial power over all "Cases" arising under federal law, and "Controversies . . . between Citizens of different States"[101] would be viewed as an implicit delegation to Congress of the power to define the scope of such an arising under "Case" or diversity "Controversy." Under that approach, the congressional determination would not be subject to judicial review.

A second, less encompassing approach to the definition of an arising under or diversity "Case" or "Controversy" would focus on the historic bases for treating claims normally falling within the jurisdiction of the English law courts at the time the Constitution was adopted as part of single equitable "case" or "controversy" based on the inadequacy of the legal remedy. Like the historic approach currently taken to the scope of the Seventh Amendment jury trial right,[102] such an approach would ask whether the Framers would have been familiar with analogous jurisdictional shifts from one court system to another.

A third, more nuanced approach would focus, not on an assumed implicit delegation to Congress or historical analogies, but rather on the express delegation of power to Congress to enact measures "which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States."[103] Such an approach would focus on the relationship between claims clearly falling within the jurisdiction conferred by Article III and the non-jurisdictional claims that Congress seeks to include in the same case. If the inclusion of the non-jurisdictional claims were "necessary and proper" to permit the effective exercise of the jurisdiction expressly conferred by the Constitution, federal jurisdiction over the claims would be sustained.

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sity jurisdiction (*see* American Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951); Barney v. Latham, 103 U.S. 205 (1881)). *Tashire*, 386 U.S. at 531. The permissibility of exercising federal jurisdiction over non-diverse parties in each of these contexts is examined separately below. *See infra* text accompanying notes 237–41, 264–68, 328–47. As will be seen, they too stand for a far less expansive use of "minimal diversity" as a basis for federal jurisdiction than proponents of the current jurisdiction expansion proposals have supposed.

101. U.S. CONST. art. III, § 2, cl. 1.

102. *See* Chauffeurs, Local 391 v. Terry, 494 U.S. 558, 565 (1990); Tull v. United States, 481 U.S. 412, 417 (1987); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 507 (1959).

103. U.S. CONST. art. I, § 8, cl. 18.

As discussed below, only the third model of federal jurisdiction provides a satisfactory approach to the issues posed by modern proposals to enlarge the scope of federal jurisdiction. The first, "delegation" model would threaten to destroy the careful allocation of judicial power between the federal and state governments prescribed by the Framers. The second approach falters because no appropriate historic analogue corresponds to the unique issues of federalism underlying the prescriptions of Article III. The third approach closely ties the exercise of Article III jurisdiction with the purposes of the constitutional grant, and thus maintains the federal and state balance contemplated by the Framers. At the same time, it gives appropriate weight to congressional findings of necessity and historic understandings as to when the joinder of parties and claims is appropriate to permit the exercise of the federal judicial function.

A. The Inadequacy of an Unrestricted "Delegation" Model of Federal Jurisdiction

In its pathbreaking decision in *United Mine Workers v. Gibbs*,[104] the U.S. Supreme Court concluded, in the context of pendent claim jurisdiction, that a federal question claim and a non-diverse state law claim between the same parties arising out of a "common nucleus of operative fact," formed part of the same constitutional arising-under "case."[105] As discussed below, the tendency of subsequent decisions and commentators has been to extend this holding to far more expansive assertions of pendent party and ancillary jurisdiction to bring non-diverse state law claims by and against additional parties within the jurisdiction of the federal courts—a development which deserves more careful scrutiny than it has received.[106] Some commentators have gone even further, however, by suggesting that even *Gibbs*'s "common nucleus of operative fact" constraint on the scope of federal jurisdiction is not constitutionally mandated. Rather, the scope of the federal arising-under "case" or diversity "controversy" should be as broad as Congress or the rules drafters may authorize in the rules for joinder of claims and parties adopted for the federal courts.[107]

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104. 383 U.S. 715 (1966).

105. *Id.* at 725.

106. *See infra* Part IV.C.

107. *See* William A. Fletcher, *"Common Nucleus of Operative Fact" and Defensive Set-Off: Beyond the* Gibbs *Test*, 74 Ind. L.J. 171, 178 (1998); Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 Cal. L. Rev. 1399, 1409–10, 1463, 1477–90 (1983). *See also* Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are What They Might Be, Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. Rev. 717, 741 (1995) (noting, but

This approach, going beyond even the most expansive interpretation of *Gibbs*, is unsatisfactory on a number of grounds. It would confer on Congress and the rules drafters the power to extract vast domains of judicial power reserved by the Constitution to the states without any relationship to the heads of judicial power conferred by Article III. For example, this analysis would permit the amendment of Rule 20[108] to authorize federal courts to exercise jurisdiction over state law claims by or against additional non-diverse litigants even though they were completely unrelated to a federal question or diversity claim properly asserted by or against other parties to the action. No apparent purpose related to the limited grants of federal jurisdiction contained in Article III would support such a jurisdictional regime, even on the dubious assumption that it could be squared with *Gibbs*'s very expansive approach to the definition of an arising-under "Case," which was based predominantly on considerations of judicial economy.[109] Such an approach would be inconsistent with the strong suspicion of the federal judicial power prevalent among many of the Framers,[110] as well as with the language of the Constitution itself. Article III confers federal judicial power over "Cases" arising under federal law or "Controversies" between diverse citizens. The question is not whether one claim between two parties to an action reasonably meets this description, but whether the complete aggregation of claims before the federal court—the entire "case" or "controversy"—is such that it may reasonably be thought to arise under federal law or to be between parties of diverse citizenship. Article III does not extend federal jurisdiction to a litigative "unit"[111] *some part of which* arises under federal law or is between diverse citizens. Rather, Article III requires that a relationship exist between the jurisdictional and non-jurisdictional claims such that the entire case or controversy before

suggesting a more limited form of the theory); Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 55–61 (1987) (concluding that once a statutory basis for jurisdiction over one of several originally asserted claims has been found, Congress should be held to have delegated the power to define the scope of the entire "civil action" or "litigative unit," including non-jurisdictional claims, to the Judiciary); Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 397, 448–49 (1976).

108. FED. R. CIV. P. 20.

109. *Gibbs*, 383 U.S. at 724–26 (stating that the justification for supplemental jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants" and that "if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . . there is *power* in federal courts to hear the whole").

110. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S: THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7–9 (5th ed. 2003).

111. *See supra* text accompanying note 39.

the federal court may fairly be viewed as falling within the scope of Article III.[112] The nature of that relationship is discussed further below.

B. The Inadequacy of an "Historic" Model of Federal Jurisdiction

An historic approach to the definition of the federal arising-under "case" or diversity "controversy" would look to analogous situations in which, at the time of the framing of the Constitution, claims or controversies normally within the cognizance of one system of English courts might be adjudicated by another, based on a determination of the inadequacy of the remedy offered by the first. The most obvious analogue would be the circumstances in which English courts of equity heard and determined claims normally within the cognizance of the courts of law in the late eighteenth century.[113] The essence of the argument would be that, in circumstances where the Framers would have been familiar with treating otherwise legal claims as part of a single equitable "case" based on the inadequacy of the remedy at law, it is permissible to aggregate otherwise non-jurisdictional state law claims with diversity claims pending before a federal court based on a determination that state court processes are inadequate to resolve them. In the present context, the question would be whether a "transactional" definition of a single equitable case consolidating otherwise separate legal claims was established at the time of the framing.

This approach to defining the scope of a federal arising under or diversity case is inadequate for two reasons. First, the "analogy" is not apt. The division of power between the federal and state governments embodied in the unique system of dual sovereignty established by the Constitution finds no analogue in the contest for jurisdiction between Chancery and the law courts in eighteenth century England.[114] Considerations of inadequate remedy that might support resort to the extraordinary remedies provided by equity within a single sovereignty do not suggest that a surrender of power to the courts of a different sovereign was contemplated by the Framers, nor do they establish that such a jurisdictional shift is necessary to provide effective remedies to litigants or to permit the courts of either sovereign to perform the tasks assigned to them by the Constitution.

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112. This approach is consistent with recent scholarship recognizing that the scope of federal subject matter jurisdiction should be determined on a "claim specific" basis. *See infra* note 281.

113. The U.S. Supreme Court appeared to adopt such an approach in Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). *See infra* note 332 and accompanying text.

114. *See* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 500 (1928) (noting that Parliament is concerned only with the distribution of its internal judicial power a single sovereignty, not the relationship of Federal courts to those of the states, which presents "a complication peculiar to a federated nation").

In any event, the historic bases for the exercise of equity jurisdiction in the late eighteenth century provide no clear support for current expansive proposals for enlarging federal jurisdiction based on "minimal diversity" of citizenship or on a simple transactional relationship among claims. It is true that equity did not follow the restrictive rules of the common law on the joinder of claims and parties, so long as the bill was not "multifarious," involving allegations of "distinct and independent matters."[115] But this liberal joinder practice generally proceeded on the assumption that all of the claims to be joined properly were cognizable in equity, rather than at law.[116] Equity rules requiring the joinder of necessary parties, permitting the intervention of third parties, and authorizing proceedings by way of interpleader all were narrowly designed to permit a court to render a complete and effective decree in the matter pending before it without prejudicing the rights of third parties who possessed an interest in the subject matter of the action. They were not based simply on a transactional relationship among parties or claims.[117] The historic

115. *See* JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS, AND INCIDENTS THEREOF, ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA § 279 (9th ed. 1879).

116. JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES, 172 (5th ed. 1925) (Rule 26, Joinder of Causes of Action) ("The plaintiff may join in one bill as many causes of action, *cognizable in equity*, as he may have against the defendant.") (emphasis added); 3A JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 18.03 (2d ed. 1996) (noting that, unlike earlier equity practice, early American codes "united law and equity, thus allowing both legal and equitable relief to be obtained when related to the same cause of action"); 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1581 (2d ed. 2001).

> The treatment of the joinder of actions by the equity courts was much more flexible than that accorded by the law courts. Generally, in a suit involving a single plaintiff and a single defendant unlimited joinder was allowed and in a multiparty dispute the chancellors had discretion to permit joinder whenever they believed it would be more convenient to settle the entire controversy in one proceeding. Nonetheless, as long as law and equity were maintained as separate systems, it still was not possible to join a legal claim with an equitable claim in either court.

Id. See also Stephen S. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 & n.71 (1987) (citing HOPKINS, *supra*, at 172 (Rule 26)).

117. *See* HOPKINS, *supra* note 116, at 212 (Rule 37).

> All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff.... Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention....

Id.; James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565–68 (1936) (discussing development of the right of intervention by those possessing an interest in the subject matter of the action); *id.* at 576–77 (providing examples of interests supporting intervention); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN THE UNITED STATES OF AMERICA; AND TO THE UNION OF LEGAL AND EQUITABLE REMEDIES UNDER THE REFORMED PROCEDURE § 114 (San Francisco, Bancroft-Whitney Co. 1881–83). Pomeroy explained that

> [t]he governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in the one suit the rights and duties of all the parties, which really grow

limitations of these procedures still are apparent in the current provisions and application of Rules 19, 22, and 24.[118]

The most closely analogous pre-framing procedure permitting the joinder in equity of purely legal claims at the time the Constitution was adopted was the class action. In his widely cited study, Professor Steven Yeazell has chronicled the development of the class action in the English Court of Chancery from the early 1700s through 1850, and has perceived in that development the seeds of the modern class action based on a theory of interest representation as somewhat imperfectly reflected in Rule 23.[119] Yeazell acknowledges that the English equity class action originally arose to meet the needs of cohesive social groups, such as copyholder tenants on a manor, and was based on a theory of express or implied consent to representation rather than on interest representation alone.[120] But with the emergence of an industrial society, he finds group litigation expanding beyond the limits of such pre-existing social groups and con-

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> out of or are connected with the subject-matter of that suit. . . . [A]ll persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree . . . shall be made parties to the suit . . . . The primary object is, that all persons sufficiently interested may be before the court, so that the relief may be properly adjusted among those entitled . . . and all may be bound in respect thereto by the single decree.

Id.; JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY, BY ENGLISH BILL 144 (2d ed., 1795) ("[A]ll persons materially interested in the subject matter ought to be parties to the suit."); *see also* Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1271 (1961) (discussing the development of the rule in equity that parties having an "interest" in a controversy be joined if feasible); *id.* at 1257 (providing illustrative examples); 3 POMEROY, *supra*, § 1320 (noting that interpleader was proper "[w]here two or more persons . . . claim the same thing, debt, or duty by different or separate interests, from a third person"); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 806 (photo. reprint 1972) (1836) (stating that interpleader is properly applied when "[t]wo or more persons claim the same thing by different or separate interests from another person").

118. Federal Rule 19, for example, requires joinder of a party to an action if "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . impair or impede the person's ability to protect that interest." FED. R. CIV. P. 19. The Federal Interpleader statute, 28 U.S.C. § 1335 (2000), allows a plaintiff to join persons who have claims against it, provided the "adverse claimants . . . are claiming or may claim to be entitled to such money or property" that has been deposited with the court. *See also* FED. R. CIV. P. 22. Federal Rule 24 also reflects the existence of earlier interest requirements. Under Rule 24, parties have a right to intervene "when the applicant claims an interest relating to the property or transaction which is the subject of the action" and the applicant's ability to protect that interest will be impaired or impeded if the applicant is not allowed to intervene. FED. R. CIV. P. 24(a).

119. *See* Stephen C. Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. REV. 514, 514–16 (1980) [hereinafter Yeazell I]; Stephen C. Yeazell, *From Group Litigation to Class Action, Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067, 1067–69 (1980) [hereinafter Yeazell II].

120. *See* Yeazell I, *supra* note 119, at 517–18.

cludes that by 1824 "[t]he group is on its way to becoming a class—not a social organism but a number of individuals sharing some interest."[121]

Accepting the general accuracy of this analysis does not establish that class actions of the kind contemplated by the modern jurisdictional expansion legislation—which predominantly are comprised of actions for retrospective damages based on the defendant's tortious conduct in which the class is affiliated only by the fact their injuries arose out of a common course of wrongful conduct by the defendant—were recognized by the Court of Chancery in England in the late eighteenth century, or even in later times. The authorities cited by Yeazell proceeded on the assumption that the plaintiff class was united by the assertion of a "common interest" or "general right" against the defendant, as illustrated by cases in which the plaintiffs sued on behalf of all shareholders of a company to require the promoters to restore to the company funds that they had wrongfully appropriated for themselves.[122] Yeazell criticizes the decisions to the extent that they appear to rely on the presence of a common interest or general right, as opposed to representation of interests. Nevertheless, both the language of the decisions and the facts of the cases show that the courts viewed the common or general nature of the right involved, and not simply a theory of interest representation based on a common factual or transactional relationship, to be crucial to the maintenance of the action.[123]

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121. *Id.* at 521.

122. *See id.* at 520–21 (discussing Hichens v. Congreve, 38 Eng. Rep. 917 (Ch. 1828)). *See also id.* at 535–38 (discussing Chancey v. May, 24 Eng. Rep. 2655 (Ch. 1722), which involved an action by owners of the Temple Brass Works to require the former treasurers and managers of the company to account for misapplications and embezzelments of its funds); *id.* at 541–44 (discussing Mayor of York v. Pilkington, 26 Eng. Rep. 180 (Ch. 1737), in which the mayor of York sued riparian proprietors seeking to establish title by prescription to fishing rights in a river; sustaining the action on the ground that the plaintiff had asserted a "general right" against the defendants); *id.* at 544–47 (discussing Leigh v. Thomas, 28 Eng. Rep. 201 (Ch. 1751), in which agents purporting to be agents for the entire crew of a vessel entitled to a share of prize money for a captured enemy ship were invited to sue on behalf of the crew); *id.* at 547–48 (discussing Good v. Blewitt, 33 Eng. Rep. 343 (Ch. 1807), in which the captain of a privateer sued the owners for an accounting of captures on behalf of all seamen possessing an interest); *id.* at 548–52 (discussing Adair v. New River Co., 32 Eng. Rep. 1154 (Ch. 1805), in which a shareholder entitled to rents from the operation of a water company was permitted to sue other shareholders as a class claiming that his rents had been unlawfully diminished by the deduction of taxes).

123. *See* FREDERIC CALVERT, A TREATISE UPON THE LAW RESPECTING PARTIES TO SUITS IN EQUITY 38–39 (1837) (noting that a class action was improper where those allegedly represented were not united by a common interest, but had "several" demands and interests); *see also* ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 193–94 (1950) (noting that where a tort had injured many persons, "[the] older cases . . . held that claims for damages by . . . numerous persons must be tried in separate actions at law"). As Professor Robert Bone pointed out in a critique of Yeazell's work, during the time period in question,

Difficulties under Rule 23 as originally promulgated in 1938,[124] such as in defining such terms as "joint" and "common" and in classifying actions as "true," "hybrid," or "spurious," led to comprehensive revision of Rule 23 in the 1966 amendments. Unlike former practice, the results of the "common question" class action under Rule 23(b)(3)[125] are intended to bind the class as a result of the requirements for typicality and adequate representation imposed by Rule 23(a)[126] and for notice to the class members and opportunity to opt out accorded by Rule 23(c) in all actions certified under Rule 23(b)(3).[127] Yeazell's theory of interest repre-

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> [i]n the multiplicity of suits cases, it was important that *all* the issues necessary to determining the *legal right* in each suit at law were shared in common. In other words, it was important that all suits involved an *identical* legal right, not just common issues. Equity took jurisdiction to declare that single legal right once and for all.

Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 237 (1990). In his view, Yeazell failed to account for the fact that the concept of representation in the Eighteenth Century in England did not relate to the representation of interests with a view to binding absent class members. Rather "[o]ne lawsuit was 'representative' of others when it was *like* those others because it implicated the same abstract configuration of legal rights and duties." *Id.* at 242. This followed from the fact that the class action in the Eighteenth Century was conceived of, not as a device to bind absent class members as it is today (and as is contemplated by the pending jurisdictional reform proposals), but rather as a response to the demands of the necessary parties rule, permitting suits to proceed to decision when it was impractical to join all interested parties. *Id.* at 246–47. *See also* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1858, 1878, 1882–85 (1998). In English equity, all persons with an "interest in the subject matter of the suit" had to be joined. Bone, *supra*, at 246–47. This did not refer to goals or litigation objectives ascribed to litigants, but rather to "formal relationships among pre-existing rights and duties that made all such rights and duties part of the same legal dispute warranting a single remedy." *Id.* at 247. The modern conception of the binding effect of a class judgment based on adequate representation of interests found its first clear expression in *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940).

124. *See* FED. R. CIV. P. 23 (1938) and advisory committee's note to the 1938 rule. *See generally* 3B MOORE, *supra* note 116, ch.23.

125. Rule 23(b)(3) allows an action to be brought as a class action if

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3).

126. Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a).

127. Rule 23 (c)(2)–(3) provide:

sentation as a basis for binding class treatment thus now has been partially realized—subject to the requirement for implicit "consent" as a result of the right to opt out—in modern Rule 23. That realization, however, was widely viewed as an innovation in 1966, particularly in respect to the binding effect of the common question class action certified under current Rule 23(b)(3).[128] That development undercuts any claim that modern jurisdiction expansion proposals aggregating state court claims not independently falling within the scope of Article III with pending or prospective federal proceedings simply on the basis of a transactional relationship among them can be justified by historic analogy to the definition of a single equitable "controversy" in England at the time the Constitution was adopted. Yeazell discerns the seeds of an interest representation theory of class actions in Calvert's treatise on equity published in 1837.[129] However, he recognizes that the implications of this "shiny new rationale" for group litigation never were realized in England. Instead, group litigation in England "went into a deep slumber lasting a century, a slumber from which it has never awakened in England," and "in the United States it has been stirred into awareness only in the last few decades."[130]

> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel. (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

FED. R. CIV. P. 23(c)(2)–(3).

128. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999) (noting that although Rule 23 as amended in 1966 was crafted "in general, practical terms, without the formalism that had bedeviled the original Rule 23," the Advisory Committee particularly anticipated "innovations under Rule 23(b)(3)"); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 390 (1967) ("cases which will pass through the screen of (b)(3) and qualify as class actions are not simply the spurious cases of former rule 23 with a discreet suppression of the old soubriquet"); *id.* at 396–97 ("The entire regulation of (b)(3) cases should be seen in contrast to the previous practice . . . . [T]he new pattern is preferable.").

> New rule 23 alters the pattern of class actions; subdivision (b)(3), in particular, is a new category deliberately created. Like other innovations from time to time introduced into the Civil Rules, those as to class actions change the total situation on which the statutes and theories regarding subject matter jurisdiction are brought to bear.

Id. at 399–400.

129. *See* Yeazell II, *supra* note 119 at 1080–85 (discussing CALVERT, *supra* note 123).

130. Yeazell II, *supra* note 119, at 1084–85. *See also* Yeazell I, *supra* note 119, at 535–38 (perceiving an underlying interest representation basis for the decision in *Chancey v. May*, 24 Eng. Rep. 265

C. LIMITS ON THE DIVERSITY JURISDICTION: A "NECESSARY AND PROPER" MODEL

Entirely apart from historic analogies, rules permitting the joinder of diverse and non-diverse state-law claims in a single action might be justified as a permissible exercise of power under the Necessary and Proper Clause to implement the authority conferred on Congress to define and limit the jurisdiction of the federal courts.[131] If the traditionally expansive

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(Ch. 1722), but recognizing that "[t]he last two hundred years of group litigation have been an attempt to come to terms with the possibilities thus posed; but *Chancey* did not do so. Instead, having reached such a daring theoretical position—without an explicit formulation of it—Chancery retreated to rambling confusing and groping rigidity for the remainder of the eighteenth century.").

Reliance on eighteenth century bills of peace as a device for avoiding a multiplicity of litigation also provides no clear historic foundation for the broad intersystem consolidation of jurisdictional and non-jurisdictional claims contemplated by current reform proposals. In more recent times, Professor Zechariah Chafee advocated broad use of bills of peace to avoid multiple suits raising common issues of law or fact (*see* CHAFFEE, *supra* note 123, at 153–57, 161), but this position lacked any clear grounding in historic equity practice. Rather, as in historic class action practice, the existence of privity or some "common" or "general" right was required as the basis for a bill of peace. As Pomeroy recognized—even while strenuously advocating broader use of the bill of peace where the only thing uniting litigants was an interest in the "common questions" presented by their actions—historically

> there does and must exist among the individuals composing the numerous body, or between each of them and their single adversary, a common *right*, a community of interest in the *subject-matter of the controversy*, or a common *title* from which all their separate claims and all the questions at issue arise; it is not enough that the *claims* of each individual being separate and distinct, there is a community of interest merely in the *question of law or of fact* involved, or in the *kind and form of remedy* demanded and obtained by or against each individual.

1 POMEROY, *supra* note 117, § 268 (emphasis in original). Pomeroy himself acknowledged that there was no clear historic precedent for his views: "when we inquire, what is the exact extent of this doctrine, in what kinds and classes of cases is a court of equity empowered to exercise its jurisdiction and administer reliefs, in order to prevent a multiplicity of suits, we shall find not only a remarkable uncertainty and incompleteness in the judicial utterances, but even a direct conflict of decisions." *Id.* § 244. Similarly, Chafee, despite advocating a more liberal approach, recognized that in the early English cases, more than an interest in common questions of law and fact was required. Usually a "community of property interest (or privity)" was required. CHAFEE, *supra* note 123, at 161. "It is certain that the early cases used it [community of interest] to mean only a community of property interest in the subject matter of the controversy, such as in the manorial common or the parish tithes." *Id.* at 172. *See also*, POMEROY, *supra* note 117, § 268 (stating that examples of this rule are "instances of controversies between the lord of a manor and his tenants concerning some general right claimed by or against them all arising from the custom of the manor, or between a parson and his parishioners concerning tithes or a modus affecting all"). Even more recently, a significant conflict of authority existed on whether common questions of law or fact were sufficient to support an equitable bill of peace. *See* Tribbette v. Ill. Cent. R.R. Co., 12 So. 32, 32 (1892); *see also* CHAFEE, *supra* note 123, at 170–83.

131. Congress's authority under the Necessary and Proper Clause is not limited to implementation of the powers enumerated in Article I, but extends to those conferred by other provisions of the Constitution, including its power to create lower federal courts and to define, within constitutional limits, their jurisdiction, conferred by Article III. *See, e.g.*, Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590 (1949); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 3.3 (6th ed. 2000); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 100–05 (1999); Martin H. Redish & Curtis E. Woods, *Congressional Power to Con-*

interpretation of the scope of congressional authority under the Necessary and Proper Clause were to be applied in this area, it would be sufficient if any conceivable rational basis could support the exercise of congressional power to expand federal jurisdiction in light of the purposes of Article III's grant of jurisdiction over "Controversies . . . between Citizens of different States."[132] Under *McCulloch v. Maryland*,[133] the Necessary and Proper Clause is broadly interpreted to permit Congress to adopt any appropriate means to achieve the objectives embraced by the powers specifically enumerated in the Constitution. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[134] The Court made clear that the clause should be interpreted to expand, not to contract, the scope of the enumerated powers, and should be broadly applied to permit the national government to attain its legitimate objectives.[135] Rejecting any strict construction of "necessary," the Court made clear that if the end was permissible, the choice of means to achieve that end was, within the limits of rational choice, for Congress rather than the judiciary.[136] *McCulloch* has come to stand for the proposition that the "test for validity of a federal act is whether the Congress might reasonably find that the act relates to one of the federal powers. If the act arguably relates to such an end, then it is valid so long as it does not violate a specific check on governmental action such as those contained in the Bill of Rights."[137]

Even under this traditional interpretation of *McCulloch*, the powers of Congress are not unlimited. Chief Justice Marshall himself made clear that the Court must perceive that congressional action is directed to the achievement of a permissible end, within the contemplation of the enumerated powers, and that "should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribu-

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trol the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. PA. L. REV. 45, 46–52 (1975);.

132. U.S. CONST. art. III, § 2, cl. 7.

133. 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.).

134. *Id.* at 421.

135. Specifically, Marshall stated:

> Its terms purport to enlarge, not to diminish the powers vested in the [national] government. It purports to be an additional power, not a restriction on those already granted. No reason has been, or can be assigned for thus concealing an intention to narrow the discretion of the national legislature under words which purport to enlarge it.

Id. at 420.

136. *Id.* at 414–18.

137. NOWAK & ROTUNDA, *supra* note 131, §3.3.

nal . . . to say that such an act was not the law of the land."[138] As developed below, this observation is very much in point with respect to significant aspects of the enacted and proposed "minimal diversity" jurisdiction expansion legislation, which are directed to the attainment of objects unrelated the purposes of the Diversity Clause that they purport to implement.[139]

More importantly, the pending federal jurisdiction expansion proposals involve a fundamental alteration of the federal state balance through the abrogation of long-standing rules limiting the diversity jurisdiction of the federal courts, as well as established rules governing the mandatory joinder of parties and claims.[140] In similar contexts, recent decisions of the U.S. Supreme Court have signaled what Professor Vicki Jackson aptly has termed a "reinvigoration of the Necessary and Proper Clause as a deliberation-forcing check on impetuous federal legislation."[141] This development has taken root in several distinct but interrelated lines of modern Supreme Court authority whose unifying theme is preservation of the values of federalism and the independent and autonomous roles of state institutions in our system of dual sovereignty.

One of these lines finds its origins in *United States v. Lopez*,[142] in which the Court, for the first time in recent history, invalidated an exercise of congressional power under the Commerce Clause on the ground that Congress had not demonstrated a sufficient connection between the activity regulated and interstate commerce.[143] Chief Justice Rehnquist's opinion for a five-member majority striking down the provision was predicated on a more rigorous review of both congressional means and ends than traditional necessary and proper analysis would have implied.[144] As to means, the Court emphasized that regulation of local activities on the ground that they affect interstate commerce must be based on "substantial" rather than "trivial" effects.[145] While denying the necessity for legislative findings to sustain every commerce clause enactment, the Court placed heavy weight on the absence of any findings establish-

138. *McCulloch*, 17 U.S. (4 Wheat.) at 423.

139. *See infra* Parts IV.A.–B.

140. *See supra* Part I.

141. Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2236 (1998).

142. 514 U.S. 549 (1995).

143. At issue was the provision of the Gun Free School Zones Act prohibiting the knowing possession of a firearm within a school zone, defined as consisting of the grounds of a public, private, or parochial school and a 1000-feet surrounding zone. *Id.* at 551, 551 n.1.

144. As to ends, the Court restricted the Commerce power to regulation of the channels or instrumentalities of interstate commerce, of persons or things moving in interstate commerce, and of "economic" activities that could be found "substantially affect, interstate commerce." *Id.* at 558–60.

145. *Id.* at 556–57.

ing a clear tie between the regulated activity and interstate commerce in the case at bar.[146] The Chief Justice's opinion emphasized that judicially enforceable limits on the commerce power must exist to preserve our "dual system of government."[147]

The willingness of the majority in *Lopez* to engage in enhanced review of the connection between congressional means and ends has found even stronger expression where federal legislation is aimed directly at the functioning of the institutions of state governments. Most prominently, despite the established principle that Congress has the power to override the States' Eleventh Amendment immunity in the exercise of its power to enforce the provisions of the Fourteenth Amendment under the counterpart of the Necessary and Proper Clause found in Section 5 of that Amendment,[148] the Court, building on its decision in *City of Boerne v.*

146. *Id.* at 562–63.

147. *Id.* at 557. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court applied *Lopez* in concluding that the Violence Against Women Act exceeded the scope of congressional power under the Commerce Clause. Unlike *Lopez*, the congressional record in *Morrison* was replete with congressional findings that the conduct prohibited had a significant effect on interstate commerce. *Id.* at 614 ("In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."). The Court held these findings insufficient, however, because they relied on an "attenuated" chain of "but for" causation, running from the alleged effect that gender-motivated violence had on its victims to decreased national productivity and increased medical and other costs, to decreased supply and demand for interstate products. *Id.* at 615. This reasoning "seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce." *Id.* That approach would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption," impermissibly altering the federal-state balance by eliminating the distinction between "what is truly national and what is truly local." *Id.* at 615, 617–18. *Morrison*, with considerable justification, has been subjected to energetic criticism for the Court's failure to defer to the extensive congressional findings before it. *See, e.g.*, Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 109–97 (2002); Susan Herman, *Splitting the Atom of Marshall's Wisdom*, 16 ST. JOHN'S J. LEGAL COMMENT. 371, 377–81 (2001); Marianne Moody Jennings & Nim Razook, United States v. Morrison*: Where the Commerce Clause Meets Civil Rights and Reasonable Minds Part Ways: A Point and Counterpoint from a Constitutional and Social Perspective*, 35 NEW ENG. L. REV. 23, 26–27 (2000); Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1 (2000). Nevertheless, the decision undoubtedly demonstrates the Court's willingness to scrutinize closely the connection between congressional ends and means in cases involving significant intrusions on areas of traditional state responsibility.

148. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976); Katzenbach v. Morgan, 384 U.S. 641, 650 (1966) (holding that "[b]y including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause"); Adickes v. S.H. Kress & Co., 398 U.S. 144, 209–10 (1970) (citing *Katzenbach*, 384 U.S. 641).

Flores,[149] has invalidated a number of important civil rights statutes insofar as they sought to subject the states to suit in federal court. In such cases, the Court concluded that the legislative record failed to establish a sufficient connection between identified Fourteenth Amendment violations by the States and the remedies that Congress had prescribed.[150]

In a third line of cases, the Court has relied on the Tenth Amendment in invalidating congressional legislation that it viewed as an undue impairment of the retained sovereign authority and functions of the states. In *New York v. United States*,[151] the Court invalidated the "take title" provisions of the Low-Level Radioactive Waste Policy Act on the ground that they, in effect, either required the states to accept ownership of the waste or to regulate according to the instructions of Congress. The principle of retained state sovereignty was violated by legislation that sought to "'commandee[r] the legislative processes of the States by di-

149. 521 U.S. 507, 536 (1997) (striking down the Religious Freedom Restoration Act of 1993 on the ground that rather than "enforce" the provisions of the Fourteenth Amendment, it sought to redefine the prohibitions of the Amendment itself).

150. In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), for example, the Court struck down that aspect of the Age Discrimination in Employment Act under a test, derived from *Boerne*, that requires Congress, in order to override the states' immunity from suit in federal court, to establish the existence both of a "pattern" of state conduct violating the Fourteenth Amendment, and a "congruence and proportionality" between those violations and the remedies adopted. *Id.* at 82–92. The majority closely examined the legislative record to determine whether override of the States' Eleventh Amendment immunity was an appropriate remedial measure. That examination revealed that the extension of the Act's enforcement provisions to the States "was an unwarranted response to a perhaps inconsequential problem" because "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 89. Findings of age discrimination by the private sector did not extend to the states, and Congress had no reason to believe that states were unconstitutionally discriminating against their employees on the basis of age. "In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress's power under § 5 of the Fourteenth Amendment." *Id.* at 91.

The Court's close scrutiny of congressional means and ends continued in *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), which invalidated the provision of the Americans with Disabilities Act subjecting the States' to suit in federal court. Rejecting the argument of the dissenters that section 5 of the Fourteenth Amendment should be broadly construed and that congressional legislation should be sustained if the Court could discern any conceivable state of facts upon which Congress might have acted, the majority concluded that the legislative record and findings were insufficient. *Id.* at 383–86 (Breyer, J., dissenting). To sustain an abrogation of the States' Eleventh Amendment immunity, the Court was required to "identify with some precision the scope of the constitutional right at issue" and then to determine whether Congress had identified a pattern of state violations of that right and whether the remedy adopted was "congruent and proportional" to the identified violations. *Id.* at 365, 374. *See also* Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 643–45.(1999). The Court has grounded these restrictive Fourteenth Amendment enforcement power decisions explicitly on the need to preserve the independent functions, autonomy, and dignity of state governments and their institutions in our federal system of government.

151. 505 U.S. 144 (1992).

rectly compelling them to enact and enforce a federal regulatory program.'"[152] Very much in point in the present context, the Court noted that such measures are "*typically the produce of the era's perceived necessity*" but the federal structure "protects us from our own best intentions" by "dividing power among sovereigns and among branches precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[153]

Finally, in *Alden v. Maine*,[154] the Court drew upon strands of its new federalism jurisprudence derived from both its Tenth and Eleventh Amendment decisions to hold that Congress lacked the power, under the Commerce Clause, to subject States to suit in their own courts for violations of the Fair Labor Standards Act. Once again, the principle of the States' "residuary and inviolable sovereignty" was determinative. The anti-"commandeering" principle of *New York* applied equally to the State's judicial as to its legislative and executive branches, because "'[T]he Constitution . . . recognizes and preserves the *autonomy and independence of the States—independence in their legislative and independence in their judicial departments.*'"[155]

Of course, these modern federalism decisions do not speak directly to the problem at hand. Proposals expanding federal subject matter jurisdiction based on the existence of minimal diversity between any two

152. *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 288 (1981)). Reviewing the history of the Constitution, the Court concluded that the Framers explicitly chose a Constitution that confers upon Congress "the power to regulate individuals, not States." *Id.* at 166. A contrary result would obscure lines of responsibility and political accountability of state governments to their electorates and impermissibly impair the retained sovereignty of the states. Maintaining the proper division of authority between federal and state governments was essential for the "protection of individuals" because "States sovereignty is not just an end in itself." *Id.* at 181. Rather, maintaining a "healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). *Printz v. United States*, 521 U.S. 898, 918–22 (1997), the Court applied the same rationale in invalidating the provisions of the Brady Handgun Violence Prevention Act requiring, on an interim basis, state chief law enforcement officers to conduct background checks on the purchasers of handguns. The Court refused to confine *New York* to the "commandeering" of state legislative action involving the determination of policy, but concluded that the anti-"commandeering" principle it had announced was equally applicable to state executive action. *Id.* at 927–33. The Court rejected the argument that the regulation at issue was justified under the Necessary and proper Clause, on the ground that

> when a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier . . . it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."

Id. at 923–24 (first alteration added) (quoting THE FEDERALIST No. 33, at 204 (Alexander Hamilton)).

153. *New York*, 505 U.S. at 187 (emphasis added).

154. 527 U.S. 706, 711–12 (1999).

155. *Id.* at 754 (emphasis added) (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938)).

adverse parties and some sort of transactional relationship between diverse and non-diverse claims do not subject the states themselves to suit in federal or state court, or direct the functioning of state legislative, executive, or judicial officers, or supersede or supplement state legislative authority through expansive federal legislation reaching matters historically regulated by the States. In their broader implications, however, the Court's recent federalism decisions articulate themes and rest on principles that call for closer analysis of the enacted and proposed federal jurisdiction expansion legislation than has been supposed. Those decisions assume that legislation significantly altering the balance of authority between the federal and state governments—whether in their legislative, executive, or judicial departments—should receive somewhat closer scrutiny than the traditional "conceivable rationality" standard would entail. In particular, the Court has closely examined the record and findings underlying the legislation in question to determine whether the ends sought by Congress are legitimate, and whether, assuming they are, a sufficiently close connection between the achievement of those ends and the means chosen either is apparent or is demonstrated by the legislative record itself.[156] Additionally, the Court has not hesitated to strike down congressional legislation that, although arguably connected to legitimate ends, employs means that sweep significantly beyond what would be necessary to achieve those purposes.[157]

The Court's recent federalism decisions and their more stringent standard of review have been subject to widespread and justified criticism.[158] Particularly in its chary treatment of legislative findings, the Court has intruded unduly on the constitutional role and institutional competence of Congress. Nevertheless, shorn of their more extreme implications, those decisions reflect a justifiable concern that significant alterations in the federal/state balance not be grounded on imaginary or hypothetical suppositions, but rather on real and substantial problems demonstrably implicating the underlying purposes of the federal power

156. *See supra* notes 142–50 and accompanying text.

157. *See supra* note 150 and accompanying text.

158. *See, e.g.*, Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1141–44 (2002); Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80 (2002); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV 367, 371–73 (2002); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1045–61 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Ana Maria Merico-Stephens, *Of* Maine*'s Sovereignty,* Alden*'s Federalism, and the Myth of Absolute Principles: The Newest Oldest Question of Constitutional Law*, 33 U.C. DAVIS L. REV. 325, 326–34 (2000); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 850–53 (1999).

at issue.[159] One of the ironies of the hearings and debates on the "minimal diversity" proposals has been the general assumption that the clear impairment of the values of federalism that they entail raises only questions of policy, rather than any constitutional concern. The need to confine the diversity jurisdiction to its intended scope, however, is not simply a matter of policy. The very existence of the lower federal courts was a matter of intense debate when the Constitution was adopted precisely because of the displacement of state judicial authority that their creation would involve.[160] These concerns led to the Madisonian compromise which empowered Congress to determine whether to create the lower federal courts, and, by implication to define their jurisdiction.[161] However, the Supreme Court has recognized that the question is not entirely entrusted to the political branches, and has held that Congress may not expand the jurisdiction of the federal courts beyond the limits of Article III.[162] That limit was imposed expressly to protect the role of the state courts in our constitutional structure.[163] If, as *Alden* recognizes, a direction to state courts to entertain cases against the state that could not be entertained in federal court represents an undue interference with the reserved judicial power of the state,[164] an unprecedented expansion of federal jurisdiction under the Diversity Clause that threatens to deprive the state courts of authority to resolve cases that lie at the historic core of the judicial power reserved to them by the Constitution deserve no less demanding review.

Such "reinvigorated" necessary and proper review would require either that Congress articulate the connection between legitimate ends and permissible means or that such a connection be apparent to the court. Such review would protect the interests of federalism while avoiding placing impenetrable barriers to Congress's enlargement of federal subject matter jurisdiction where the purposes of the Diversity Clause or

159. As Professor Vicki Jackson has argued, achieving this result does not require the Court to endorse substantive state "enclaves" of authority, or necessarily imply any normative valuation of the relative federal and state interests at stake. Jackson, *supra* note 141, at 2240 (advocating adoption of a "clear evidence/clear statement" requirement). Instead, "[r]equiring Congress to explain itself—to justify the basis for federal regulation in areas not previously regulated at the federal level and not obviously within an enumerated power—may help it to do its job better by forcing it to be more thoughtful about whether a national law is the appropriate solution." *Id.* These observations also are pertinent to a massive transfer of judicial power from the state to the federal judiciaries, contrary to the prevalent allocation of judicial power that has held sway for over two hundred years.

160. FALLON, *supra* note 110, at 7–9, 19–27.

161. *Id.* at 8.

162. *See* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 607 (1949) (plurality opinion) (Rutledge, J., concurring); *id.* at 626 (Vinson, C.J., dissenting); *id.* at 646–47 (Frankfurter, J., dissenting).

163. *Id.* (Frankfurter, J., dissenting).

164. *See supra* note 155 and accompanying text.

other heads of federal judicial power would be served. Such a process-based inquiry would permit the Court to "monitor federal legislation on federalism grounds" by focusing on "connections to enumerated powers and on demonstrated need for federal involvement," and would avoid the necessity for the Court to "substitut[e] is own judgment of the 'degree of necessity' once it is clear Congress has made a reasoned and reasonable judgment."[165] Courts should not strain to supply, *ex post*, some "conceivable" rationale that possibly might have led Congress to enact the proposed legislation to achieve the purposes of the Diversity Clause, no how attenuated it might be and without any evidence that Congress shared that objective. To do so would undermine the special competence of Congress to assemble and evaluate facts bearing on whether the purposes of the Diversity Clause are implicated, as well as its political responsibility to determine whether such a significant alteration of the federal/state balance is warranted to achieve those ends.

A moderately demanding necessary and proper review along the suggested line would not conflict with the U.S. Supreme Court's recent decision in *Jinks v. Richland County, South Carolina*,[166] in which the Court sustained the provision of the supplemental jurisdiction statute tolling the statute of limitations for state law claims originally filed in federal court over which the court later declines to exercise supplemental jurisdiction.[167] Rejecting any test of "absolute necessity," the Court upheld that provision under the Necessary and Proper Clause on two grounds: first, on the ground that it contributed to the fair and efficient operation of the federal courts by eliminating "the unsatisfactory options that federal judges faced when they decided whether to retain jurisdiction over supplemental state-law claims that might be time-barred in State court,"[168] and second, because it removed a "serious impediment to access to the federal courts on the part of plaintiffs pursuing federal- and state-law claims in federal court under the supplemental jurisdiction doctrine."[169]

In contrast to the statute in *Jinks*, the enacted and pending proposals for expansion of federal jurisdiction on the basis of minimal diversity, in many of their applications, raise substantial questions both of validity

165. Jackson, *supra* note 141, at 2242.

166. 123 S. Ct. 1667, 1669 (2003).

167. *See* 28 U.S.C. § 1367(d) (2000) (tolling state statute of limitations for the time during which the claim was pending in federal court and an additional period of thirty days).

168. *Jinks*, 123 S. Ct. at 1671 (those options included retaining jurisdiction contrary to the evident statutory policy, conditionally dismissing the claim on waiver of the statue of limitations defense, which might be refused, or the cumbersome route of outright dismissal with leave to refile if the claim were held to be time barred).

169. *Id.*

and appropriateness. Unlike *Jinks*, they authorize the federal courts to exercise jurisdiction over non-diverse state law claims in circumstances where that is not necessary to permit the federal courts fairly and efficiently to dispose of cases properly pending before them. Moreover, as discussed further below, the ends that Congress sought to achieve frequently bear little or no relationship to the purposes of the Diversity Clause. And, where legitimate ends are identified, the means employed frequently have no apparent connection to those ends, or sweep far beyond what would be necessary to achieve them.

IV. ANALYSIS OF THE PROPOSED EXPANSIONS OF FEDERAL DIVERSITY JURISDICTION

A. THE CLASS ACTION FAIRNESS ACT

1. *Questionable Objectives*

As the class action jurisdiction act has progressed through various versions over the years, its proponents have articulated a variety of objectives to support its enactment. A good many of these have very little to do with the core objectives of the Diversity Clause, which is focused on protecting out-of-state litigants from prejudice in local courts. Rather, they explicitly rest on a distrust of the competence and fairness of state courts in general—a view that would have surprised the Framers of the Constitution. As previously discussed,[170] the bills have sought to combat alleged "collusive settlements" negotiated by class counsel in state court actions, in which defendants purchase peace by providing large fees to class counsel and inadequate rewards to class members. State courts were alleged to have provided inadequate scrutiny of such settlements. Moreover, state courts were alleged to possess inadequate resources to handle complex litigation. Additionally, they were thought to lack the ability to aggregate multiple proceedings arising out of a single transaction, preventing fair, consistent, and efficient adjudication. Standing alone, these justifications fail to bring the proposed legislation within the purposes of the diversity jurisdiction. The conventional justification for that clause—the prevention of bias against out-of-state litigants—does not address alleged inadequacies and inefficiencies in the state courts in general, but rather bias against out-of-state litigants in those courts.[171]

170. *See supra* text accompanying notes 82–94.

171. Thus was the only justification for the diversity jurisdiction articulated by Hamilton in his defense of the Diversity Clause of Article III in the Federalist Papers. *See* THE FEDERALIST No. 80, at 114 (Alexander Hamilton) (Tudor Publishing Co.) (1937) (ascribing the diversity jurisdiction to the need for "tribunal[s] which, having no local attachments, will be likely to be impartial between the different States and their citizens"). *See also* Bank of the United States v. Deveaux, 9 U.S. 61, 87 (1809) (Marshall, C.J.).

In-depth consideration of the use of "minimal diversity" as a basis for federal court jurisdiction can be traced to the ALI's 1968 Study of the Division of Jurisdiction Between State and Federal Courts, conducted under the distinguished supervision of Richard H. Field as Chief Reporter, and Paul J. Mishkin and Charles Allen Wright as Reporters.[172] Unlike the current enactments and proposals, that Study recognized the need to adhere closely to the purposes of the Diversity Clause in fashioning its proposals for revision of federal court jurisdiction. The Study's central recommendation regarding the general diversity jurisdiction was to eliminate the possibility that it might be invoked, as an original matter, by an in-state citizen. Such jurisdiction was "not responsive to any acceptable justification for diversity jurisdiction. The in-stater can hardly be heard to ask the federal government to spare him from litigation in the courts of his own state. Any prejudice which he may fear is not of the kind against which the diversity jurisdiction was intended to protect."[173]

In making this recommendation, the Study concluded that access to federal courts based on diversity of citizenship should be permitted only upon a showing of "strong reasons therefor."[174] That was because "[s]o long as federal courts continue to decide cases arising under state law without the possibility of state review, the state's judicial power is less extensive than its legislative power; this is an undesirable interference with state autonomy."[175] Very much in point in the present context, the Study emphasized that its proposals "relate to the distribution of power between federal and state judicial systems" and to "'basic principles of federalism.'"[176] Even if federal courts were assumed to be "better" in some sense than those of the states, "this would not justify taking away from the state courts cases arising under state law that are properly the business of the states."[177]

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Id.

172. ALI STUDY, *supra* note 100.

173. *Id.* at 124.

174. *Id.* at 99.

175. *Id.*

176. *Id.* (citation omitted).

177. *Id.* at 100. The Study's basic proposal limiting the invocation of diversity jurisdiction by "in-staters" was accompanied by a variety of subsidiary proposals dealing with such matters as the definition of corporate and associational citizenship, all designed to tailor and limit the exercise of diversity jurisdiction to cases in which its core purpose would be served. *See id.* § 1301(b), (e); *id.* at 112–19, 121–23. Of particular interest were the recommendations assimilating unincorporated associations to

Most pertinent to the present topic was the Study's separate proposal of a new "head" of federal jurisdiction in multiparty, multistate cases based on the existence of minimal diversity of citizenship where "one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction."[178] In resting this grant of jurisdiction in multistate, multiparty cases on the existence of minimal diversity, the Study foreshadowed both the Multiparty, Multiforum Trial Jurisdiction Act of 2002 and the current class action proposals. Moreover, the Study's analysis of the constitutionality of federal jurisdiction based on minimal diversity clearly underlies the present confident but unelaborated assertions that these proposals raise no constitutional difficulties.[179] On closer examination, however, the Study's recommendation provides little support for the current, more expansive enactments and proposals. To the contrary, its carefully limited scope and close attention to the purposes of the Diversity Clause contradicts some of the most basic premises on which they are based.

In contrast to the current enactments and proposals, the Study emphasized that because its proposal represented a significant transfer of power from state to federal courts, it required a greater justification than either judicial economy or distrust of the competence and fairness of state courts could provide.[180] "[T]he simple fact that more cases might be

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the treatment of corporations by treating them as citizens of the principal place of business regardless of the citizenship of their members. The Study justified this recommendation specifically on the ground that "complete diversity" between all adverse parties was not a constitutional requirement. *Id.* at 116. The Study also authorized non-diverse claims by or on behalf of family members residing the same household as a federal diversity plaintiff to be joined in the same action, provided they arose out of the same transaction as the diversity claims on the ground that such joinder would promote sound judicial administration. *Id.* § 1301(e); *id.* at 121–23. And, while adhering to existing law limiting removal based on diversity of citizenship to a defendant who was not a citizen of the state from which removal was sought, the Study recommended dispensing with the requirement that all defendants join in the petition for removal and would have permitted removal of an entire action by an out-of-state defendant diverse from one plaintiff even though the action involved claims against non-diverse defendants as well or included some plaintiffs not diverse from the defendant. *Id.* § 1304. This recommendation was thought to serve the purposes of the diversity jurisdiction because the joinder of non-diverse plaintiffs or defendants would not serve to prevent prejudice against an out-of-state defendant—at least in cases involving "several" claims. "It is nevertheless true that, regardless of the plaintiff's purpose, when an out-of-stater is joined with a resident defendant in a case involving several liability or liability in the alternative, he is subject to the risk of local bias to as great a degree as if he were sued alone by an in-state plaintiff." *Id.* at 144. In all of these respects, the Study obviously proceeded on the assumption that "minimal" diversity satisfied constitutional requirements in the specific contexts with which it dealt.

178. *Id.* § 2371(a).

179. *See id.* at 387–88, app. A. The Study's analysis of the minimal diversity issue provided one basis for the Supreme Court's conclusion in *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530–31 (1967), that the federal interpleader statute authorizing federal interpleader where any two adverse claimants are of diverse citizenship is constitutional. *See supra* text accompanying notes 95–100.

180. ALI STUDY *supra* note 100, at 375–79.

better—or more efficiently—tried in federal court is not itself sufficient justification for such jurisdiction. The problems involved here do not relate simply to trial efficiency at large, but grow out of the multistate nature of our Union and hence present a special basis for federal intervention."[181]

For this reason, the Study's authorization of federal jurisdiction based on minimal diversity in multistate, multiparty cases was strictly limited to cases that satisfied two very demanding requirements, neither of which circumscribes the current proposals for federal jurisdiction expansion. Specifically, federal jurisdiction on that basis would have been authorized only where (1) "several defendants who are *necessary for a just adjudication of the plaintiff's claim*" were (2) "*not all amenable to process of any one territorial jurisdiction.*"[182] The proposal was thus based on the necessity for a federal court to hear intertwined state law claims to permit it to resolve a diversity claim properly before it, not on broadly defined judicial economy objectives or mistrust of state courts. It would have permitted the origination in or removal to federal court of complex litigation only where no state was capable of joining all of the parties necessary to the just resolution of a federal plaintiff's diversity claim.[183]

The commentary repeatedly emphasized this central point. The requirement that the non-diverse parties be "necessary for a just adjudication" was "*intended to express that degree of urgency for the presence of scattered parties which goes beyond trial efficiency and economy, and involves further elements relating to the adequacy or fairness of a disposition made in the absence of particular parties.*"[184]

The Study also recognized that the historic purposes of the diversity clause might be more broadly viewed as including the promotion of interstate commercial intercourse by assuring litigants—particularly business enterprises—that they may conduct business "away from home"

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181. *Id.* at 378.

182. *Id.* § 2371(a) (emphasis added).

183. Under the Report's recommendation, a defendant was

> necessary for a just adjudication of the plaintiff claims . . . if complete relief cannot be accorded the plaintiff in his absence, or if it appears that, under federal law or relevant State law, an action on the claim would have to be dismissed if he could not be joined as a party,

invoking concepts of "necessary" or "indispensable" parties akin to those of Federal Rule of Civil Procedure 19. *Id.* § 2371(b). The Study made clear that "[p]ersons against whom several liability is asserted shall not be deemed necessary for a just adjudication of the plaintiff's claim because liability is asserted against them jointly or alternatively as well." *Id.*

184. *Id.* at 385 (emphasis added). The Study pointed out that however justified a complete diversity requirement might be as a general matter, in the specific context at issue "it would operate . . . to deny an effective forum in many multistate cases" because it would exclude cases in which a plaintiff wished to sue defendants only some of which were diverse from a federal forum "even though no other court could provide a just adjudication of the action." *Id.* at 387.

with assurance that they will have access to an adequate and impartial forum for the resolution of any disputes that may arise.[185] One of the main arguments for the interstate class action jurisdiction act seems to relate to this concern, but in this respect it paints with too broad a brush. Proponents of the legislation have argued that what they term "interstate class actions" "typically affect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit" and fall within the rationale of the diversity jurisdiction for that reason.[186] But, putting aside the fact that the term "interstate class actions" is a somewhat misleading description of the range of cases covered by the proposed legislation—which encompasses any class action in which any class member is of diverse citizenship from any defendant—this claim does not withstand analysis. The fact that litigation may involve large numbers of parties, or a large sum of money, or have "interstate commerce ramifications" does not, standing alone, bring it within the rationale of the diversity jurisdiction. Litigation entirely between citizens of a single state may involve many parties, much money, and have enormous implications for interstate commerce. Of course, the impact of such nonfederal cases on interstate commerce might provide a basis for congressional regulation or preemption of state law under the Commerce Clause.[187] But so long as Congress has not addressed those "ramifications" by substantive legislation, they remain within the legislative and judicial power of the States.[188]

The claims of the proponents of the proposed class action legislation would come within the rationale of the diversity jurisdiction only if its provisions were addressed to the prospect of discrimination against out-of-state litigants, or the deterrence of commercial intercourse among the states *because* out-of state business enterprises might fear subjecting themselves to litigation in the courts of the foreign States. As discussed below, the provisions of the class action legislation are not well crafted to address these concerns.

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185. *Id.* at 434–35.

186. H.R. REP. No. 108-144, at 6–7 (2003).

187. *See* Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 206–08 (1990).

188. For this reason, the argument that the diversity jurisdiction was intended to prevent "class bias" by providing protection against state legislatures "making decisions that were hostile to commercial interests," sweeps too broadly if divorced from the requirement that such protection is accorded for the benefit of those forced to litigate away from the courts of their own state. Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 KAN. L. REV. 863, 879–80 (1990). For a general review of scholarship exploring the purposes of the Diversity Clause, see 13B WRIGHT ET AL., *supra* note 116, § 3601.

Yet another rationale advanced to support the proposed legislation has been that state courts supposedly have inappropriately applied their own procedural and substantive law to cases involving litigants from other states. Congress has found that "State courts are . . . making judgments that impose their view of the law on other States and bind the rights of the residents of those States."[189] This rationale is both tenuous and unconnected to the purpose of the Diversity Clause. Of course, states are constrained by due process limits that prevent them from applying their own law to transactions with which they have no significant contact or relation.[190] But where such a connection does exist, they are free to apply their ordinary choice of law rules to transactions having interstate ramifications without violating the Commerce Clause or any other provision of the Constitution. Under the *Erie* doctrine, federal courts would be required to make the same choice—however ill-advised it may be.[191] This result might be different if Congress were to adopt a federal choice of law rule to govern interstate mass torts cases, as the ALI's 1994 Complex Litigation Report suggested,[192] but the proposed class action legislation contains no such provision. The "problem"—if it is one—exists in both class action and individual litigation, and in both federal and state courts. Proponents of this argument for the proposed class action jurisdiction act have not explained how it serves the purposes of the Diversity Clause, which is to prevent local bias against out-of-state litigants that could be expected to exist in state court but not in federal court.

2. Unobjectionable Provisions

In examining the proposed class action legislation certain points should be put to one side. For example, the proposed legislation alters a number of long-standing principles, such as (a) the rule arising from *Snyder v. Harris*[193] and *Zahn v. International Paper Co.*[194] that the claims of class members may not be aggregated in determining the jurisdictional amount; (b) the rule of complete diversity; and (c) rules requiring all defendants properly served to join in a notice of removal and that none of them be citizens of the state from which removal is sought.[195] Divorced

189. Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. § 2(a)(5)(C) (2003).

190. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 308, 313 (1981).

191. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

192. ALI REPORT, *supra* note 1, § 6.01.

193. 394 U.S. 332, 339–42 (1969).

194. 414 U.S. 291, 301–02 (1973).

195. *See* 28 U.S.C. § 1441(b) (2000) (any action that does not arise "under the Constitution, treaties or laws of the united States . . . shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"); *id.* § 1446(a)

from the overly broad way in which they are applied in the proposed legislation, none of these alterations raises significant constitutional concerns, even applying a rigorous standard of necessary and proper review.

For example, the Constitution prescribes no jurisdictional amount for diversity cases, and whether it should exist, and in what amount, clearly remains entirely within Congress's control. The results in *Snyder* and *Zahn* rested on the U.S. Supreme Court's conclusion that Rule 23 was not intended to alter the long-standing rule of statutory construction precluding aggregation of claims by plaintiffs in diversity cases unless they asserted a "common and undivided interest" in a "single title or right."[196] But nothing in the Constitution speaks to this issue or precludes Congress from altering this long-standing rule. Congress properly could conclude that class actions in which the claims of the class, in aggregate, exceed the sum or value of five million dollars exclusive of interest and costs are sufficiently important to invoke the federal judicial power, assuming that the purposes of the Diversity Clause otherwise are served.

Similarly, again assuming that the purposes of the diversity jurisdiction would be served, there is no magic in the long-standing "complete diversity" requirement of *Strawbridge v. Curtiss*.[197] That decision involved plaintiffs asserting a joint interest, and the decision expressly left open the possibility—not subsequently taken up—that the result might be different where the plaintiffs asserted separate and distinct claims.[198] Al-

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("A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal . . . ."). *See also* 7A WRIGHT ET AL., *supra* note 116, § 1756 (aggregation of claims), § 1759 (describing rules governing removal in diversity cases); 13B WRIGHT ET AL., *supra* note 116, § 3606 (diversity rule); 14B WRIGHT ET AL., *supra* note 116, § 3704 (aggregation of claims).

196. In *Snyder*, the Court noted that "[t]he traditional judicial interpretation" of the diversity statutes

> has been from the beginning that the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement. Aggregation has been permitted only (1) in cases in which a single plaintiff seeks to aggregate two or more of his own claims against a single defendant and (2) in cases in which two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest.

394 U.S. at 335. The Court explained that Rule 23 did not bring about a change in the "doctrine that separate and distinct claims could not be aggregated" and that the doctrine "was never, and is not now, based upon the categories of old Rule 23." *Id.* at 336. The Court upheld this ruling in *Zahn*, concluding that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case." 414 U.S. at 301. *See also* 7A WRIGHT ET AL., *supra* note 116, § 1756; 14B WRIGHT ET AL., *supra* note 116, § 3705.

197. 7 U.S. (3 Cranch) 267, 267–68 (1806).

198. The Court explained in *Strawbridge*

> that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the

though Chief Justice Marshall did not elaborate, the common explanation for this reservation has been that where local bias against an out-of-state claimant necessarily would prejudice a local citizen as well—as it would in the case of joint interests but not necessarily where the plaintiffs asserted separate and independent claims—a jury would be unlikely to find against an out-of-state citizen at the expense of one of their own.[199]

Whatever the explanation, Congress reasonably could find otherwise, whether joint or several claims are at issue.[200] Thus, if one or more plaintiffs who are of diverse citizenship from a defendant jointly assert claims with co-citizens of that defendant, Congress might reasonably conclude that the diverse plaintiff or plaintiffs might suffer local bias in the courts of the defendant's state despite the presence of co-citizens on the same side.[201] The same is true where a plaintiff joins claims against multiple defendants, some of whom are of diverse citizenship from the plaintiff and some of whom are not.

For the same reason, the restriction preventing removal unless all defendants join in the notice of removal and none of the defendants are citizens of the state from which removal is sought might be abrogated by Congress to protect a non-citizen defendant from local bias, even where

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persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.

But the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States.

Id. at 267–68.

199. *See* ALI STUDY, *supra* note 100, at 433.

[T]he *Strawbridge* holding can probably best be justified on the theory that the purpose of diversity jurisdiction was to protect an out-of-state citizen from possible prejudice at the hands of a local tribunal, and that where the diverse citizen has a "joint" interest with a non-diverse party, his protection lies in the fact that he cannot be discriminated against without also hurting the non-diverse party.

Id.

200. The ALI Study explained further that, although *Strawbridge's* rationale might be accepted "[a]s a construction of the statutory grant in *Strawbridge*," as a

construction of the Constitution it cannot stand. Even on a view of diversity jurisdiction as serving only to allow protection of the out-of-state citizen from a hostile local tribunal, surely Congress might at some time reasonably conclude that local tribunals could be so hostile as to discriminate against non-citizens even at the cost of hurting one of their own, and must therefore be able to extend a federal forum even where the interests are "joint." Moreover, even on that same view of the jurisdiction's purpose and even assuming the effectiveness of "jointness" with co-citizens as protection, the concepts underlying ancillary jurisdiction would authorize Congress to confer jurisdiction with less than total diversity. Congress must be able to act to assure that resort to an authorized federal forum not be impeded by the imposition of extra burdens, such as the necessity of double litigation with its inefficiency and expense. Certainly that would imply power to permit joinder of parties and claims at least to the degree required to achieve that objective—a degree that would necessarily encompass some co-citizens with "joint" interests.

Id. at 433–34.

201. *Id.*

it is joined in the same action with local defendants who are not subject to the same bias. The difficulty is not with the alteration of these principles in the abstract, but rather with the particular way in which the pending jurisdictional expansion legislation proposes that it be done.

Another pivotal aspect of the proposed class action reform legislation is the decision to consider the citizenship of all class members as well as those of the named class representatives in determining whether minimal diversity of citizenship exists.[202] Of course, this departs from long-standing practice in the federal courts, in which the citizenship only of the named parties was considered.[203] This practice did not result from legislative direction, but from the common law, which regarded the class representatives as the true parties to the action.[204] Indeed, historically the class action was a device permitting litigation to proceed without the presence of otherwise necessary parties who could not, as a practical matter, be joined.[205] In recent years, courts have held that unnamed class members are not true "parties" in a variety of contexts, including such matters as the ability to make strategic decisions, to conduct and be subjected to discovery, and to appeal the results of the litigation.[206] On the other hand, class members under Rule 23 and state class action rules are true "parties" in a most significant sense because, provided the requirements of due process are satisfied, they may be legally bound by the judgment in the action.[207]

Recently, the U.S. Supreme Court addressed these conflicting currents in *Devlin v. Scardeletti*. Departing from the prevailing view developed in the courts of appeals, the Court held that objecting class members may appeal the adequacy of a class action settlement regardless of whether they have intervened as parties in the trial court proceed-

202. *See supra* text accompanying notes 70–78.

203. As the Supreme Court recently reaffirmed in *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002), "[n]onnamed class members are . . . not parties" for the purpose of determining diversity of citizenship.

204. *See supra* note 203.

205. *See supra* note 123.

206. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808–09 (1985) (distinguishing between the burdens imposed on absent members of a plaintiff's class and burdens imposed on parties before the court); Guthrie v. Evans, 815 F.2d 626, 628–29 (11th Cir. 1987) (holding that a nonnamed class member may not appeal a final litigated judgment entered against the class); Dellums v. Powell, 566 F.2d 167, 187 (D.C. Cir. 1977) (holding that discovery against absentee class members may be had under certain circumstances only and not "as a matter of course"); 7A WRIGHT ET AL., *supra* note 116, § 1755.

207. *See* Hansberry v. Lee, 311 U.S. 32, 42–43 (1940). *See also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 (1996) (stating that all members of a class in a class action suit are bound by any judgment entered in the action unless they opt out). The Court in *Matsushita* held that class plaintiffs wishing to preserve their right to litigate their claims must "opt out of the settlement class" or risk being bound by the result of the litigation. *Id.* at 379, 385.

ings.[208] The Court emphasized that in determining whether class members should be treated as parties to the litigation, the focus must be on the purpose for which the question is asked.[209]

With respect to the pending class action jurisdiction proposals, the issue is whether diverse class members may be subjected to local prejudice despite the fact that all of the named class representatives are of the same citizenship as all of the defendants. Conceivably this could be true, particularly given the limitation in the most recent proposed legislation carving out litigation in which most class members are citizens of the same state as the "primary defendants" and the claims will be governed by the laws of that state.[210]

3. Removal by In-state Citizen Defendants

One of the ironies of the movement for interstate class action reform is that it is focused on protecting large corporate and other business defendants from supposedly unjustified settlement pressure generated by the threat of large damages awards in state courts regardless of their citizenship or local presence.[211] This concern is not related to the underlying rationale of the diversity jurisdiction. Notably, the proposed legislation continues to treat corporate defendants as citizens of both the states of their incorporation and their principal place of business.[212] Because the class action proposal permits removal of state litigation by any defendant who is of diverse citizenship from any member of the plaintiff class, without regard to the fact that the removing defendant may be a citizen of the state in which the action was brought,[213] it is difficult to see how the legislation is addressed to the problem of discrimination against non-citizens

208. Devlin v. Scardeletti, 536 U.S. 1, 14 (2002).

209. "Nonnamed class members, however, may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Id.* at 9–10.

210. It is troubling, however, that the question of whether actual prejudice against out-of-state class members could be expected where most or a significant number of class members were of diverse citizenship from the a defendant even though none of the named class representatives were, received no attention in the history of the proposed legislation. Undoubtedly, the reason for this omission is the fact that the legislation is not aimed at preventing prejudice to out-of-state class members at all. Rather, it is aimed at protecting large corporate and other business defendants from allegedly unjustified verdicts in state courts, regardless of their state citizenship.

211. *See supra* text accompanying notes 82–88.

212. *See* Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. § 4 (2003). Section 4 of the proposed legislation amends 28 U.S.C. § 1332, the general diversity statute, but makes no changes to § 1332(c)(1) which defines corporate citizenship for the purposes of diversity jurisdiction. *Id.*

213. *Id.* § 5 (adding a new § 1453(b) to 28 U.S.C., which states, "[a] class action may be removed to a district court of the United States in accordance with this chapter, without regard to whether any defendant is a citizen of the State in which the action is brought").

or out-of-state business enterprises that was the core concern of the Diversity Clause.

One might nevertheless contend that, given the arguments just reviewed supporting original federal court jurisdiction over class actions involving "minimal diversity" between some class members and one or more defendants, the validity of removal jurisdiction over such actions follows as a matter of course. This argument would rest on the close tie between original and removal jurisdiction reflected in the general removal provision of the Judicial Code.[214] But the general coextensiveness of original and removal jurisdiction is not and historically has not been complete.[215] Supporters of the legislation have assumed that the prohibition against removal by an in-state defendant, extant—with only a brief hiatus—since the enactment of the first Judiciary Act,[216] may be removed without debate or concern. But such a long-settled practice established at the foundation of the Republic provides some guidance regarding the meaning of the Constitution itself.[217] From the adoption of the Constitution until now, the Diversity Clause has been thought to provide an option for non-citizen plaintiffs to litigate either in federal or state court

214. 28 U.S.C. § 1441(a)-(b) (2000).

215. *See* FALLON, *supra* note 110, at 1536–37.

216. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80 (1789). The 1875 amendment to the diversity removal statute allowed for removal in any case "in which there shall be a controversy between citizens of different States," and further allowed that "either party may remove said suit into the circuit court of the United States for the proper district." Judiciary Act of 1875 § 2, 18 Stat. 470 (1875). "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." Judiciary Act of 1875 § 2. This expansive language, however, was repealed in 1887 and removal again was restricted to non-resident defendants. Act of Mar. 3, 1887, §§ 1–2 24 Stat. 552–53 (1887) (as corrected by Judiciary Act of Aug. 13, 1888, 25 Stat. 433, 434 (1888)). This restriction has remained in effect to the present day. *See* 28 U.S.C. § 1441(b) (2000). *See generally* 1A MOORE *supra* note 116, ¶ 0.1156[1]–[2].

217. *See, e.g.*, Walz v. Tax Comm. of City of N.Y., 397 U.S. 664, 678 (1970).

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated: "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ."

Id. at 678 (quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).

> The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. . . . As Mr. Justice Holmes observed in an analogous context, in resolving such questions of interpretation "a page of history is worth a volume of logic." . . . The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation.

Id. at 681 (citing New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

according to their own appraisal of the comparative advantages of doing so, not to restrict them to the single option of federal court process at the election of their in-state adversaries. Of course, Congress might alter this understanding if it served the purposes of the Diversity Clause, but no discernable connection between those purposes and the proposed removal provision appears.

On the other hand, one might argue that diversity actions commenced by in-state plaintiffs or class representatives routinely are entertained by the federal courts.[218] This argument overlooks significant differences between original actions commenced by in-state citizens and class actions in which one or more members of the class are of diverse citizenship from one defendant (even though none of the named plaintiffs may be) commenced in state court and then removed by an in-state defendant or defendants to federal court. Original actions in which the plaintiff or, in the class setting, named plaintiffs, are of diverse citizenship from one or more defendants fit rather easily within the literal terms of the Diversity Clause, which contains no language limiting its application to situations in which the plaintiff or plaintiffs are non-citizens of the state in which the action is brought.[219] Moreover, apart from the fact that the language of the Constitution fails to exclude original actions commenced by in-state citizens against non-citizens, Congress could have concluded that the purposes of the Diversity Clause generally would be served by authorizing federal jurisdiction over such actions. In such cases an out-of-state citizen is being haled against its will into the courts of another state. Although not all such defendants would be unwilling, Congress might reasonably have concluded that most would welcome the protection of a neutral federal forum, and would not be harmed.

These arguments are not necessarily transferable to a context not so obviously within the text of the Diversity Clause, nor so readily tied to its purposes. Unlike original jurisdiction based on diversity of citizenship, removal jurisdiction is nowhere mentioned in the text of the Constitution. It has been sustained as an exercise of congressional power under the Necessary and Proper Clause.[220] By their nature, jurisdictional pro-

218. It was this aspect of diversity jurisdiction that the 1968 ALI Study proposed to alter. *See supra* notes 172–73 and accompanying text.

219. *See* 28 U.S.C. § 1332 (2000).

220. U.S. CONST. art. I, § 8, cl. 18 (Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) (The "power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power."); Tennessee v. Davis, 100 U.S. 257, 263 (1879).

posals resting on necessary and proper implementation of the Diversity Clause rather than its literal text, demand some connection between congressional means and legitimate congressional ends. It is bootstrapping to argue that it is necessary and proper to treat absent class members as "parties" to achieve the purposes of the Diversity Clause, and then to contend that their classification as parties justifies removal by an in-state citizen without regard to those purposes.

Viewed in terms of the purposes of the Diversity Clause, removal by defendants of class actions commenced in state court in which one or more class members are diverse from defendants, all of whom are citizens of the state in which the action is brought, implicates those purposes remotely, if at all. Class actions commenced in state court by a named representative on behalf of absent class members presumptively indicate that the forum of choice for the class is that of the state, even though some class members may be citizens of other states. This presumption might be undercut if the named class representatives were shown to be

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> By the last clause of the eighth section of the first article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Among these is the judicial power of the government.

Id.

> Powers expressly enumerated are granted to Congress, and such as shall be necessary and proper for carrying the enumerated powers into execution, or, in other words, the powers of Congress are made up of concessions from the people of the several States, with such implied powers as are necessary and proper to carry the express concessions into effect, subject to the limitation that whatever is not expressly granted or necessarily or properly implied to carry the granted powers into effect is reserved to the States respectively, or to the people. Like the other powers specified, the judicial power of the United States is a constituent part of those concessions from the several States, and as was held by this court at a very early period, it is to be exercised by the Supreme Court or such inferior courts as the Congress may from time to time ordain and establish.

Id. at 274–75 (Clifford, J., dissenting).

> Section 1441(c) finds support in Congressional power under the "necessary and proper" clause of Article I, Section 8. . . .
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> . . . .
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> . . . While the "necessary and proper" clause is not without limitation, it has been applied to supply constitutional authority to support legislative policy where otherwise such authority might be doubtful. Where considerations of convenience and economy of litigation dictated, the expansive "necessary and proper" clause frequently has been relied upon to sustain judicial power beyond the strict limits of Article III . . . . [T]he whole notion of removal [for example], nowhere provided for in the Constitution, is itself a creature of Congressional power "to make all Laws which shall be necessary and proper for carrying into Execution . . . all Powers vested by this Constitution." Analogous extensions may be found in the doctrines of ancillary and pendent jurisdiction under which Federal courts adjudicate many kinds of claims for which there is no independent jurisdictional basis rooted in Article III.

Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913, 920–21 (S.D.N.Y. 1965) (alteration in original) (citations omitted); JACK FRIEDENTHAL ET AL., KANE & MILLER'S CIVIL PROCEDURE §2.11 nn.3–4 (1999).

inadequate, or if the class members had no right to opt out, but the defendant removal provision of the proposed class action legislation contains no such limitations.[221]

At the very least, a moderately demanding necessary and proper review would require evidence that Congress had addressed this problem, had a reasonable basis for finding that removal by in state defendants would serve the purposes of the Diversity Clause in such a setting, and that the remedy provided was significantly related to the purpose of protecting out-of-state citizens from prejudice in local courts.[222] No such consideration or findings accompany the current class action proposals—again probably for the reason that the provision for removal by in state defendants was not included for the purpose of protecting class members, but rather for the purpose of protecting the defendants themselves.[223]

One argument in support of the class action act's defendant removal provision might invoke Congress's broad power to define, for diversity purposes, the citizenship of corporate enterprises and other artificial entities.[224] Congress left the definition of corporate citizenship for diversity purposes for the U.S. Supreme Court to develop as a matter of federal common law for over 150 years, during which the Court's views on the matter evolved from treating a corporation as a citizen of every state of which its shareholders or members were citizens to the presumption that a corporation was a citizen only of its state of incorporation, its shareholders being only represented or nominal parties.[225] In 1958, however, Congress amended the Judicial Code to provide that a corporation should be deemed a citizen of each state in which it was incorporated and of the state in which its principal place of business was located.[226] This provision was intended both to reduce the workload of the federal courts and to remedy the abuse of permitting a corporation to invoke the diversity jurisdiction against the citizens of a state in which its principal place

221. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812–14 (1985) (recognizing the due process right of class members lacking minimum contacts with the forum state to opt out of a class action seeking damages relief).

222. *See supra* notes 141–65 and accompanying text.

223. A related argument in support of the class action jurisdiction proposal would point to the fact that the current statutory requirement prohibiting removal by an in-state citizen may be waived if it not properly raised by a motion to remand. *See* 14B WRIGHT ET AL., *supra* note 116, §3721, at 370–75. But in this context, a plaintiff who is the intended beneficiary of the Diversity Clause has chosen to litigate in federal court by failing to request a remand. In such circumstances, it is not unreasonable to assume that maintenance of the action in federal court does protect the intended beneficiaries of the diversity jurisdiction.

224. *See* 13B WRIGHT ET AL., *supra* note 116, §§ 3623–30.

225. *See id.* § 3623.

226. *Id. See* 28 U.S.C. § 1332(c)(1) (2000).

of business was located, even though it was unlikely to suffer local prejudice in that state.[227] As such, it is logically tied to the existence of possible local prejudice against non-residents, and falls well within Congress's power under Article III, as augmented by the Necessary and Proper Clause, to define and limit the jurisdiction of the federal courts within the outer boundaries of Article III.

Perhaps Congress might have redefined corporate citizenship for diversity purposes so that a large corporation conducting interstate business would not be deemed a citizen of the state of its principal place of business, on the theory that such an interstate corporate enterprise might suffer local prejudice even there because of its size and interstate connections.[228] But the class action jurisdiction act does not do so, and rests on no findings to that effect. It preserves the existing definition of corporate citizenship, reflecting the conclusion, embodied in section 1332(c)(1) of the Judicial Code,[229] that a corporation is not likely to suffer local prejudice in the state in which it maintains its principal place of business, and should not be able to invoke the diversity jurisdiction in an action by or against opposing parties from that state. Neither the act's provisions nor its rationale support the conclusion that Congress has redefined the citizenship of corporate enterprises to tie the act's provisions for removal by in-state corporations to the purposes of the Diversity Clause.

From another perspective, the class action act's defendant removal provision might be argued to represent an effort by Congress to allow local defendants to protect the interests of absent class members who are citizens of another state. In *Shutts*, for example, the U.S. Supreme Court held that class action defendants had standing to raise the due process objections of absent class members based on their absence of minimum contacts with the forum.[230] But *Shutts* provides a poor analogy in the present context. Most notably, *Shutts* rested on the interest of the defendants in that case in assuring themselves that any final class action judgment would be binding on the absent class members.[231] In the interstate class action jurisdiction context, by contrast, in-state corporate defendants presumably would benefit from the existence of local prejudice against absent class members from other states. Additionally, the context in *Shutts* differs fundamentally from that here. There, the Court acted to

227. *See* 13B WRIGHT ET AL., *supra* note 116, § 3624.

228. *But see* Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. § 4(a)(2)(d)(8) (2003) ("For purposes of this subsection and section 1453 of this title, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.").

229. 28 U.S.C. § 1332(c)(1).

230. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821–22 (1985).

231. *Id.*

ensure that state courts could render a binding class judgment. In the present context, the issue is not whether a state court class action judgment would be binding—as it would provided that the notice, opt out, and adequate representation requirements of that decision were satisfied.[232] Rather, it is whether Congress intended to permit local defendants to remove because it had some basis for believing that the rights of absent non-citizen class members were at issue and those members would be unable adequately to protect their own interests. Nothing in the legislative history suggests that Congress permitted removal by local defendants in interstate class actions to achieve this purpose, or that the absent class members who hypothetically might suffer local prejudice could not protect their own interests by opting out or by themselves removing the action from state to federal court.

4. Plaintiff Removal

Viewed from a plaintiffs' perspective, stronger arguments connect the act to the purposes of the Diversity Clause. The act's findings and history do focus on allegedly inadequate class settlements benefiting primarily lawyers rather than class members in "interstate" class actions in which the citizenship of a substantial number of class members differs from that of the primary defendant or defendants. These findings are not tied to any unique disadvantage suffered by out-of-state class members on account of local bias, as opposed to disadvantages allegedly suffered by class members in general regardless of their citizenship on account of the alleged deficiencies of state courts. They do reflect the conclusion, however, that the alleged problem of inadequate class settlements disadvantaging class members has been prevalent in class actions involving interstate aspects.[233] These findings arguably relate closely enough to the purpose of the Diversity Clause to assure an impartial and adequate forum to litigants forced to litigate "away from home" to sustain the act in at least some of its applications. However, the removal provisions of the act seem unconnected and disproportionate to the perceived problem, even assuming that was their motivation. For example, any unnamed class member may remove the entire action, regardless of the state of citizenship of either the removing class member or of the defendant.[234] Thus, an in-state citizen class member may remove not only its own claim but the entire action from state to federal court, even though there is no basis for finding that that plaintiff would be subject to local prejudice leading to an inadequate settlement.

232. *Id.* at 811.

233. *See supra* text accompanying notes 82–94.

234. *See supra* text accompanying note 77.

Perhaps this provision might be rationalized on the ground that removal by non-diverse class members serves to protect the interests of other class members who might be subject to local bias. Although perhaps plausible, the legislative history and findings contain no indication that Congress ever considered this possibility, or that the act was intended to address it. Nothing would prevent allegedly disadvantaged class members from protecting themselves from possible local bias leading to an inadequate settlement by opting out of the action—a right which they would possess in any class action seeking damages not only under all state class action rules modeled after Rule 23, but also arguably under the Due Process Clause itself.[235] Additionally, the removing class members are allowed not simply to remove their own claims, but also those of all other class members, including those of class members who are not of diverse citizenship from the defendants and who would prefer the choice of the class representatives to litigate in state court.[236]

In this last respect, the act's plaintiff removal provisions represent a very large intrusion on the ability and autonomy of named class representatives—as well as of the class members themselves—to choose a state forum which they believe may be more favorable to their interests than a federal court. That intrusion is accompanied by a corresponding interference with the sovereign interests of the states in affording a judicial forum to their own citizens. Perhaps this impairment of state sovereignty could be justified by analogy to the now repealed separate and independent claim provision of the Judicial Code which, as it formerly applied to diversity cases, allowed any diversity defendant who was not a citizen of the state in which an action was commenced to remove not only the diverse claim against that defendant, but also the entire action of which it was a part, provided the diversity claim was "separate and independent" from other claims asserted in the action.[237] But putting aside the fact that the constitutionality of the separate and independent claim provision in diversity actions was never directly considered by the U.S. Supreme Court,[238] the analogy seems weak, as protection of the removing non-citizen party in such actions fell within the core purpose of the Diversity Clause. In such circumstances, Congress may have concluded that removal of the entire action, coupled with a provision allowing but not requiring remand of the non-jurisdictional claims,[239] represented the best

235. *See Shutts*, 472 U.S. at 811.

236. *See supra* text accompanying note 77.

237. *See* 14C WRIGHT ET AL., *supra* note 116, § 3724.

238. *Id.* The Court appeared to assume the validity of the provision in *Barney v. Latham*, 103 U.S. 205 (1880), but did not directly consider the question.

239. § 1441(c) in its 1948 version provided:

balance of the competing interests at stake.[240] This approach continued to respect the plaintiff's initial joinder decisions while protecting out-of-state litigants from local bias.[241]

5. Removal Before Class Certification and in Non-class Actions

Other provisions of the act also raise concerns under a necessary and proper analysis. For example, the act allows a defendant to remove a class action meeting its requirements even before a class action has been certified.[242] To the extent that federal jurisdiction in such cases is based on the diverse citizenship of class members, rather than that of the named class representatives, it allows removal of an action even though no plaintiff party is of diverse citizenship from any defendant at the time of removal.[243] Even under the most liberal view, however, before the action has been certified as a class action, the members of the purported class are merely prospective, rather than actual "parties" to the action.[244] From the time of the first Judiciary Act until now, removal in diversity

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> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. § 1441(c) (1948). The current version of § 1441(c) applies only to federal question cases. *See* 28 U.S.C. § 1441(c) (2000).

240. The class action act permits the actions covered by its provisions to be commenced originally in federal court where one or more class representatives are citizens of the different states than one or more defendants, even if some of the named plaintiffs are citizens of the same state as some defendants, or, in cases where all of the named class representatives are citizens of the same state as the defendants, if a substantial number of class members are citizens of a different state. Here, as in the case of removal by out-of-state defendants, the act appears to be logically related to the purpose of the diversity clause. Even assuming the absence of complete diversity among the named parties, Congress might reasonably conclude that the presence of one or more named representatives of diverse citizenship, or of a substantial number of diverse class members, could lead to local prejudice against the class as a whole. Although Congress did not specifically articulate this chain of reasoning in its findings and conclusions, and the legislative hearing record does not focus on it, the act's overall conclusions that "interstate" class actions involving a substantial number of class members of different state citizenship than one or more defendants have presented a substantial risk of inadequate class settlements might well be accepted as adequately tied to the core purposes of the Diversity Clause.

241. A plaintiff wishing to litigate in state court could voluntarily dismiss the diverse defendant and seek a remand to state court, or could voluntarily dismiss the action and refile the action omitting the diverse defendant in state court. Congress also could have viewed the provision for removal of the entire action to be necessary to avoid deterring removal by the non-resident defendant because of the prospect of duplicative litigation in both federal and state court. *See* Twentieth Century-Fox Film Corp. v. Taylor, 239 F. Supp. 913, 920–21 (S.D.N.Y. 1965); 14C WRIGHT ET AL., *supra* note 116, § 3724.

242. Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. §5 (2003) (adding § 1453(c) to the Judicial Code).

243. *Id.*

244. *See, e.g.*, Devlin v. Scardelletti, 536 U.S. 1, 16 n.1 (2002) (Scalia, J., dissenting) ("Not even petitioner . . . is willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*") (emphasis in original).

cases has turned on the citizenship of those who are actually parties to an action, not of those who might become parties through amendment or otherwise. Similarly, the most recent version of the proposed legislation treats as class actions not only non-class actions in which monetary claims of one hundred or more claimants are joined in the same action (in which case the arguments previously outlined based on possible inadequate representation of the class in choosing a state forum are inapplicable), but also any action in which the plaintiff "purports to act for the interests of its members (who are *not* named parties to the action) or for the interests of the general public" in seeking damages, restitution, or other monetary relief, other than a state attorney general.[245] The import of this language is hardly clear, but it apparently was intended to encompass actions similar to those authorized by the California unfair competition law.[246] Clearly however, it purports to authorize original or removal jurisdiction over actions in which none of the parties before the court is of diverse citizenship from any adverse party. This would be an unprecedented extension of diversity jurisdiction.

6. Summary

In sum, the provisions of the class action jurisdiction act expanding federal original and removal jurisdiction are in some respects arguably tied to the purposes of the Diversity Clause, but in other, significant respects, such as the broad rights of removal conferred on in-state defendants and plaintiffs, sweep considerably beyond what those purposes logically might require. Perhaps ultimately those provisions might pass muster. Perhaps the alleged problem of inadequate class settlements in actions in which some class members might be subject to out-of-state bias is of sufficient magnitude that any class action presenting that danger should be litigated in federal court. Perhaps that is true despite the wishes of those allegedly subject to that discrimination to litigate in state court where the prospects of a large jury verdict might, by the hypothesis of those promoting this legislation, be greater than in federal court. But Congress, in passing the proposed class action legislation, did not articulate the chain of reasoning that led it to conclude that the expansive provisions of the proposed legislation were tailored to serve purposes

245. H.R. 1115 § 4(a)(2) (adding new § 1332(d)(9)(A), (B) to the 28 U.S.C.) (emphasis added). This provision is deleted from S. 1751, a proposed substitute for S. 274. *See supra* note 70.

246. CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2002). Section 17204 authorizes "any person acting for the interests of itself, its members or the general public" to sue. § 17204. It is settled, however, that only equitable remedies such as injunctions and restitution are authorized by that statute. *See, e.g.*, Kasky v. Nike, Inc., 45 P.3d 243, 249 (Cal. 2002), *cert. granted*, Nike, Inc. v. Kasky, 537 U.S. 1099 (2003), *cert. dismissed*, Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003); Kraus v. Trinity Management Serv's, Inc., 999 P.2d 718, 725 (Cal. 2000); Dean Witter Reynolds, Inc. v. Super. Ct., 259 Cal. Rptr. 789, 799 (Cal. App. 1989).

underlying the Diversity Clause. A requirement that means be connected to legitimate ends would focus congressional attention on the questions previously raised, and might well result in revisions that would prevent the proposed legislation from being used by in-state business interests seeking protection from the courts of their own states.[247]

B. THE MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2002

Like the proposed class action legislation, the Multiparty, Multiforum Act bases federal jurisdiction on the existence of "minimal diversity" between any two adverse parties, allows removal of an entire action from state court by any defendant without the consent of that defendant's co-parties, and allows removal even if one or more defendants—including the defendant seeking removal—is a citizen of the state from which removal is sought.[248] The Multiparty, Multiforum Act thus raises many of the same issues already discussed in connection with the proposed class action legislation. At the same time, the multiparty, multiforum legislation, which has a much longer lineage than the class action proposals, differs from them in several important respects, and in some applications presents even more difficult problems of federal jurisdiction.

1. Impermissible Objectives

One obvious area of difference is the stated purpose of the acts. The class action proposals at least make some effort to articulate purposes that might align their provisions for expansion of federal jurisdiction with those of the Diversity Clause. In basing the act on alleged class action abuses in state court, the act at least opens the possibility that its provisions are designed to protect out-of-state citizens from prejudice as a result of inadequate scrutiny of class actions and settlements in state court.[249] By contrast, the underlying purpose of the multiparty, multiforum legislation from its inception in the 1970s until the enactment of the Multiparty, Multiforum Trial Jurisdiction Act of 2002 has been to achieve judicial economy and consistent results by consolidating in federal court disparate litigation that no single state could entertain on its own.[250] Proponents of the legislation have not argued that its sweeping

247. *See* Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 329 (1853) (noting that the diversity jurisdiction was intended to protect distant plaintiffs from the power and influence wielded by corporations "in almost every state"). Even assuming that the legislation might pass constitutional muster, the diversity jurisdiction should not, as a matter of policy, be expanded without regard for the purposes that it serves. *See* Frankfurter, *supra* note 114, at 514 (noting that it would be improvident to enlarge the jurisdiction of the federal courts "to every subject, in every form, which the constitution might warrant") (quoting Turner v. Bank of Am., 10 U.S. (4 Dall.) 8 (1799)).

248. *See supra* Part I.C.

249. *See supra* text accompanying notes 82–86.

250. *See supra* text accompanying notes 57–68.

provisions, particularly those relating to removal and intervention, are necessary to protect citizens forced to litigate away from home, promoting fairness and interstate commercial intercourse in that way. The multiparty, multiforum legislation assumes that the unadorned existence of "minimal diversity" found somewhere among a consolidated group of transactionally related claims—*even if they have been independently asserted in separate state court actions in which no diversity of citizenship exists*—provides a sufficient jurisdictional "hook" on which to hang legislation directed to other ends.[251] For the reasons previously discussed,[252] this lack of focus on the purposes of the very clause of the Constitution on which jurisdiction under the multiparty, multiforum legislation is grounded should raise serious concern. Even under the traditional, relaxed version of the necessary and proper analysis articulated in *McCulloch v. Maryland*,[253] that question turns on whether the purposes sought to be achieved are a "legitimate" object of the national government, and whether the means chosen are "plainly adapted to that end."[254]

The legislative history of the Multiparty, Multiforum Act contents itself with the *pro forma* citation of the U.S. Supreme Court's statement in the *Tashire* case for the proposition that jurisdiction based on minimal diversity is constitutional.[255] But as previously explained, *Tashire* involved

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251. *See supra* text accompanying notes 12–26 and notes 57–68.

252. *See supra* Part IV.A.

253. 17 U.S. 316, 421 (1819).

254. *Id.*

255. There is little mention of the jurisdictional basis for the multiparty, multiforum acts in their respective legislative histories, but early proponents of the legislation mention *Tashire* as support for the proposition that minimal diversity is a constitutionally sufficient. Alan B. Morrison, an early proponent of Federal court mass tort jurisdiction based on minimal diversity, stated, "there is no question that the minimal diversity provided here, as in the interpleader, is constitutional, and any greater degree of diversity would prevent the consolidation of these cases which it is the aim of this amendment to provide." *1978 Hearings*, *supra* note 57, at 182 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group, Washington, D.C.). Later Morrison explained that, under *Tashire*,

> a case can enter the Federal courts with one diverse plaintiff and one diverse defendant and that that is what has been upheld in the interpleader action. Here, where the purpose is to try to encourage these kinds of cases to come into the Federal courts, there is no reason to burden them with excessive diversity requirements.

Id. at 186.

During the next Congress and as part of the Department of Justice's proposal, Daniel J. Meador also noted that the jurisdictional basis for the acts is minimal diversity, based on the *Tashire* ruling. *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings Before the House Comm. on the Judiciary, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 96th Cong. 160 (1979) [hereinafter 1979 Hearings] (statement of Daniel J. Meador, Assistant Att'y Gen., Office for Improvements in the Administration of Justice, U.S. Department of Justice). Mr. Meador noted,

> [i]t is intended that the rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)—which requires complete diversity as the basis for federal jurisdiction—shall not apply to actions brought pursuant to this section. The touchstone of the jurisdictional requirement provided by this section is minimal diversity which the Supreme Court has held is enough to meet the requirements of the Constitution.

an interpleader setting in which jurisdiction over all claims to the same property was essential if the federal court was to resolve the diversity claim properly before it.[256] The conclusion that this limited holding based on clear necessity stands for the proposition that jurisdiction based on "minimal diversity" may be extended to other, entirely different contexts is unwarranted. No such necessity exists in the case of duplicative federal/state litigation arising from the same transaction. Diversity claims arising from one accident or transaction may be entirely and successfully litigated in federal court without the joinder of non-diverse claims that may arise from the same events—as they have been since the founding of the Republic.[257] The contention that it would be more rational and efficient if they all were resolved in one forum has no apparent connection to the purposes of the diversity jurisdiction.

2. *Party Joinder*

A central feature of the multiparty, multiforum legislation has been the authorization for multiple plaintiffs to join their claims arising out of a single transaction—or, in the most recent versions of the act, accident—in a single original federal court action against one or more defendants even though not all plaintiffs are of diverse citizenship from all defendants as *Strawbridge v. Curtiss* presently requires.[258] That provision might be thought to promote the purposes of the diversity clause by avoiding deterrence of the use of the federal forum by its intended beneficiaries. As the ALI's 1968 Study points out, joinder of transactionally related claims against multiple defendants in a single action may be necessary to permit the plaintiff to join all potentially liable defendants in a single case, minimizing litigation costs and avoiding the possibility of inconsistent judgments in separate actions.[259] Absent such a provision, a federal plaintiff possessing transactionally related claims against both diverse and non-diverse defendants might be deterred from invoking federal jurisdiction to resolve its claim against defendants of diverse citizenship,

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Id. at 160 (citing State Farm Fire & Ins. Cas. Co. v. Tashire, 386 U.S. 523 (1967)).

256. *See supra* text accompanying notes 95–100.

257. *See* Atlantic Coast Line R.R. Co. v. Locomotive Eng'rs, 398 U.S. 281, 295–96 (1970); Kline v. Burke Constr. Co., 260 U.S. 226 (1922).

258. *See supra* text accompanying notes 57–68.

259. In particular, that Study argued that the voluntary joinder of multiple plaintiffs or defendants, some diverse and some not diverse from each other, might be supported on the ground that

> inefficiency and added costs might be sufficient to discourage use of the federal courts by those specifically intended to be protected by a federal forum. Congress must be able to remove impediments of this kind that might make the federal forum less attractive than the state courts and thus impose a burden on invoking federal jurisdiction.

ALI STUDY, *supra* note 100, at 430 n.13 (supporting Memorandum A). Again, "Congress must be able to act to assure that resort to an authorized federal forum not be impeded by the imposition of extra burdens, such as the necessity of double litigation with its inefficiency and expense." *Id.* at 434.

choosing instead to litigate in a state court where all of its claims could be economically and consistently resolved in the same action. Similarly, a group of plaintiffs injured by a single defendant as a result of a single transaction or series of transactions may well conclude that the strength and economic viability of their case will be enhanced if they join their claims together in a single action. Absent the ability to join both diverse and non-diverse claims in a single federal action, these considerations might deter plaintiffs having proper diversity claims from asserting them in federal court, driving them to a state forum where their prospects would be higher. Under a necessary and proper analysis, Congress or the rules drafters rationally could choose to remove these impediments to the invocation of federal diversity jurisdiction to assure that the purposes of the Diversity Clause are achieved. But greater difficulties are encountered as the full range of application of the legislation is examined.

3. Removal

This is particularly true of the expanded removal provisions of the Multiparty, Multiforum Act. In their narrowest application, these provisions are defensible implementations of the Diversity Clause. If an out-of-state citizen defendant is joined in state court with other plaintiffs or defendants who may not be completely diverse from their adversaries, that non-citizen defendant might nonetheless be subject to local prejudice, and thus is a legitimate object of the protection that the Diversity Clause was intended to provide. Perhaps that protection might be afforded by allowing that defendant to remove only the claims against it, leaving the balance of the litigation in state court. Just as in the case of the long-standing but now-repealed "separate and independent claim" provision of the removal statute applied in diversity cases, however, Congress might reasonably conclude that plaintiff's joinder decisions reflect strategic and efficiency considerations that should be respected, and choose instead to retain the shape of the litigation as originally framed, while affording the protection of a federal forum to a removing non-citizen.[260] That decision would not simply achieve judicial economy, but avoid a deterrent to removal by the out-of-state defendant raised by the prospect of repetitive litigation in federal and state court.

This rationale is not applicable to more expansive applications of the Act's removal provision. Like the proposed class action legislation, the Act authorizes removal of an action that could originally have been brought by the plaintiffs in federal court under its provisions by any defendant even though all defendants are citizens of the state from which

260. *See supra* text accompanying notes 237–41.

removal is sought.[261] The difficulty in reconciling this provision with the purposes of the diversity jurisdiction already has been discussed in connection with the similar provision of the proposed class action legislation.[262] How is the protection of out-of-state citizens from local prejudice, or the promotion of interstate commerce by affording the guarantee of a neutral forum to interstate business enterprises forced to litigate "away from home," promoted by permitting in state citizens to remove actions filed in the courts of their own state by out-of-state plaintiffs? The connection under the Multiparty, Multiforum Act is even more tenuous than that under the class action jurisdiction proposal, however. In the former context no argument can be constructed that removal by in-state citizen defendants may be necessary to protect the interests of perhaps inadequately represented class members.

Even greater difficulty is presented by another aspect of the Multiparty, Multiforum Act's removal provisions. Through successive drafts, the Act has authorized the removal from state court of a free-standing action in which there is *no diversity of citizenship at all*, provided that one defendant to the action is a party to *another* action satisfying the Act's minimal diversity and single accident requirements "which is or could have been brought, in whole or in part . . . in a United States district court" under the Act's provisions, and which "arises from the same accident as the action in State court, *even if the action to be removed could not have been brought in a district court as an original matter.*"[263] This provision achieves the efficiency goal of the legislation, but neither the proponents of the legislation nor its legislative history have offered any justification for it in terms of the purposes of the Diversity Clause.

Such a rule of mandatory joinder of an action comprising only non-diverse state law claims with a federal diversity action arising out of the same facts is not justified by the necessity to facilitate access to federal court by plaintiffs who possesses diversity claims that are closely related to non-diverse claims by other plaintiffs or against other defendants. By definition, the plaintiffs covered by the removal provisions have no such diverse claims. Nor is removal in this context justified by the need to protect the in-state citizen defendant from prejudice in the courts of its own state. The fact that such a defendant might be subject to such prejudice in other litigation filed by other plaintiffs is beside the point. To justify such an unprecedented intrusion on the retained powers of the states, more

261. *See supra* text accompanying note 64.

262. *See supra* text accompanying notes 211–32.

263. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020(b)(3)(B), 116 Stat. 1758, 1826 (2002) (adding new section (e)(1) to 28 U.S.C. § 1441) (emphasis added).

should be required than the bare citation of the U.S. Supreme Court's unelaborated decision in *Tashire*.

4. Intervention

The Multiparty, Multiforum Act's intervention provision also warrants closer scrutiny. Under the Act, long-standing rules governing intervention and supplemental jurisdiction would be disregarded. Those rules, which, have clear antecedents in historic joinder practice,[264] require a proposed intervenor of right to possess an interest in the subject matter of the action in which intervention is sought that is not adequately represented by existing parties and that will, as a practical matter, be prejudiced if intervention is not allowed.[265] The current supplemental jurisdiction statute controversially has excluded claims by and against non-diverse intervenors of right in diversity actions, regardless of whether they would be regarded as necessary or indispensable parties under Rule 19.[266] However, preexisting law and respected analysis leave little doubt that recognition of supplemental jurisdiction over the claims of intervenors meeting the requirements of current Rule 24(a) would be consistent with Article III.[267] That result follows from the recognition that Congress must have the power to prevent the judgments of federal courts in cases properly pending before them from prejudicing, legally or practically, the rights of those not before the court.[268]

The Multiparty, Multiforum Act alters these long-standing principles by permitting intervention of right in a pending federal action meeting its minimal diversity requirements by any person asserting a claim arising out of the accident giving rise to the pending action, without regard to

264. *See supra* text accompanying notes 113–30.

265. *See* Fed. R. Civ. P. 24(a).

266. 28 U.S.C. § 1367(b) (2000).

> [T]he district courts shall not have supplemental jurisdiction . . . over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b). *See also* Arthur & Freer, *supra* note 54, at 966; Fairman, *supra* note 54; Freer, *supra* note 54 at 474–79.

267. *See* 7C WRIGHT ET AL., *supra* note 116, §1917; Freer, *supra* note 54, at 474–79; McLaughlin, *supra* note 54, at 958–70; Wendy Collins Perdue, *The New Supplemental Jurisdiction Statute—Flawed but Fixable*, 41 EMORY L.J. 69, 77–81 (1991); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 105–07 (1992).

268. By contrast, under existing law, Rule 24(b)'s authorization for permissive intervention where the proposed intervenor's claim has a "question of law or fact in common" with those asserted in the main action will not support the assertion of supplemental jurisdiction, but requires that the proposed intervenor's claim possess an independent jurisdictional basis. *See* 7C WRIGHT ET AL., *supra* note 116, § 1911.

the requirements of Rule 24(a), "even if [the proposed intervenor] could not have brought an action in a district court as an original matter."[269] Thus, a plaintiff who is not of diverse citizenship from any defendant in the pending federal action, who asserts no claim arising under federal law, and who possesses no interest in the subject matter of the action, may join the federal action over the objections of some of all of the existing parties, and contrary to long-standing federal practice and the historic antecedents of the present intervention rule.[270] Under only a modestly demanding necessary and proper screen, this proposed expansion of the diversity jurisdiction at the expense of state courts raises concern. The expansion of federal jurisdiction over actions originally filed in federal court in which only minimal diversity between adverse parties is present might be justified on the ground that such a provision is necessary to facilitate access to federal court by those who possess diverse claims that they wish to join with non-diverse claims for strategic and economic reasons. No similar justification can be advanced for the Multiparty, Multiforum Act's authorization for litigants asserting no diversity claims at all to intervene in a pending federal action. That joinder is not necessary to facilitate the assertion of the claims of the parties before the court, because they already have invoked the federal forum. Nor is joinder of a non-diverse claim necessary to facilitate access to the federal court by the proposed intervenor because, by definition, the intervenor is not an intended beneficiary of the Diversity Clause. In short, no "necessary and proper" basis for the inclusion of such claims in the pending federal action readily appears.[271]

C. The Relevance of Supplemental Jurisdiction

As previously discussed, the proposals of the ALI's 1994 Complex Litigation Project were in some respects broader than those of the Multidistrict, Multiparty Act. In its enacted version, that Act applies only to civil actions that arise from a "single accident" in which more than seventy-five persons have died "at a discrete location," and certain other

269. Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, § 11020(b)(1)(A), 116 Stat. 1758, 1826 (2002) (adding a new §1369(d) to 28 U.S.C.).

270. *See supra* note 117 (for historic antecedents).

271. Because allowing such intervention would simply add another non-diverse claimant who could have been included voluntarily in the original action under the suggested rationale, one might argue that permitting such a party to join the action later by intervening entails no significant expansion of federal court domain under the diversity clause. What this line of argument leaves out, however, is that the diversity justification for permitting the voluntary joinder of non-diverse parties in an original action does not extend to those not voluntarily joined. The intended beneficiaries of the Diversity Clause have already asserted their claims in federal court without conceiving any necessity for the joinder of non-diverse plaintiffs.

qualifications are met.[272] By contrast, the ALI's 1994 proposal broadly would have authorized removal, transfer, and consolidation of any state court action that involved a "common question of fact" with a pending federal action, regardless of whether the parties to the state court action were of diverse citizenship, provided that the state court action arose from the "same transaction, occurrence, or series of transactions or occurrences" as a pending federal action.[273]

Despite their differing scopes, the Multiparty, Multiforum Act and the ALI's complex litigation proposal share common ground. They both authorize removal of state court actions involving minimal, or even no, diversity of citizenship between the parties, and they abolish the long-standing rules requiring that (a) only defendants may remove; (b) all defendants must join in the notice of removal; and (c) removal be denied where any defendant to the removed action is a citizen of the state from which removal is sought.[274] To this extent, they present many of the same issues, despite the potentially much broader scope of the ALI's proposal. Moreover, they rest on the common premise that because "complete diversity" is only a statutory rather than a constitutional requirement, any consolidated federal action in which a "minimal diversity hook" is found properly may be litigated in federal court. They assume that to be true even where some of the claims in that action originally were filed in state court, involved no diversity of citizenship at the time they were filed in and removed from state court, and acquired the status of "minimal" diversity only by virtue of their consolidation with a pending federal action between diverse parties.

Although the ALI Report referred briefly to *Tashire* and the concept of minimal diversity, it instead grounded its recommendations for expansion of federal jurisdiction primarily on the concept of "supplemental" jurisdiction.[275] According to the ALI, provided that the claims in the consolidated federal action were "transactionally related" to those in the removed and transferred state proceedings, the federal court might exercise jurisdiction over all of them under the concept of pendent jurisdiction as developed in *United Mine Workers v. Gibbs*[276] and subsequent decisions. In *Gibbs*, the U.S. Supreme Court had sustained the exercise of federal jurisdiction over a non-diverse state law claim that arose out of a "common nucleus of operative fact" with a federal question claim.[277]

272. *See supra* text accompanying notes 57–68.
273. *See supra* text accompanying notes 32–56.
274. 28 U.S.C. §1441(b) (2000).
275. *See supra* text accompanying notes 32–56.
276. 383 U.S. 715, 725 (1966).
277. *Id.*

The Court stated that where such a transactional relationship existed, the claims before the federal court constituted "one constitutional case" falling within the scope of Article III.[278]

In its focus on the relationship of the jurisdictional and non-jurisdictional claims, the ALI properly recognized that the formal presence of minimal diversity between any two claims in an action without regard to the relationship of those claims or the posture in which they arose, does not, in an of itself, provide a sufficient basis for upholding the exercise of federal jurisdiction over the entire action.[279] The doctrine of supplemental jurisdiction, like the antecedent doctrines of pendent and ancillary jurisdiction from which it descends, asks whether the relationship between the jurisdictional and non-jurisdictional claims in the action is such that all of the claims may appropriately be said to be part of one "arising under" or diversity case.[280] This is consistent with recent scholarship concluding that federal court jurisdiction is "claim specific" and that federal jurisdiction over an entire civil action properly is found to exist only if all of the claims asserted in the action fall within the original jurisdiction of the federal courts or are supplemental to those that do.[281] The "minimal diversity" thesis underlying the Multiparty, Multiforum Act and the proposed class action jurisdiction legislation, by contrast, does not inquire whether each claim in the action properly falls within the original or supplemental jurisdiction of the federal courts. Rather, it as-

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278. *Id.*

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [federal law]," and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." ... The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

Id. (emphasis in original).

279. Other recognitions of this point include C. Douglas Floyd, *The ALI, Supplemental Jurisdiction, and the Federal Constitutional Case*, 1995 BYU L. REV. 819, 856 (1995); Steinman, *supra* note 107, at 745–46, 758–59; McLaughlin, *supra* note 54, at 903, 910.

280. *See supra* note 278.

281. *See, e.g.*, John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25, 26, 40, 46 (1998) (concluding that the "fundamental unit of litigation" for the purpose of federal court jurisdiction is the claim rather than the "civil action" and describing the rule of "complete diversity" as a common law limitation on the exercise of supplemental jurisdiction over non-diverse claims). Professor Oakley was the reporter for the ALI's recent Federal Judicial Code Revision Project, and his ideas find expression in its proposed revisions to the supplemental jurisdiction statute. *See* AMERICAN LAW INSTITUTE, Federal Judicial Code Revision Project, Tent. Draft No. 2 (1998) (proposed revision of 28 U.S.C. § 1367). Professor Oakley assumes that a transactional relationship among claims asserted in the same action is sufficient to support the exercise of supplemental jurisdiction in diversity as well as federal question cases. Oakley, *supra*, at 46–47. The validity of that common assumption is addressed in depth below.

serts that so long as any one claim in an action including multiple claims properly joined under extant rules of party and claim joinder is between diverse citizens, the entire action may be maintained in federal court. This theory disregards the critical point that, just as where non-diverse state law claims are joined to federal question claims, actions involving the joinder of diverse and non-diverse state-law claims should be held to fall within the jurisdiction of the federal courts only if the relationship between the diversity claims and the non-diverse state law claims justifies bringing the latter before the court as an exercise of supplemental jurisdiction.[282]

1. *Necessary and Proper Limits on the Exercise of Supplemental Jurisdiction over Non-diverse State Law Claims*

To this the supporters of the federal jurisdiction expansion proposals might demur, on the ground that they assume the very kind of transactional relationship among the joined claims that the U.S. Supreme Court found to be sufficient to support the exercise of pendent claim jurisdiction in *Gibbs*.[283] In its 1994 Complex Litigation Report, the ALI concluded that the *Gibbs* transactional relationship test for pendent claim jurisdiction[284] "has provided the starting point for analyzing ancillary jurisdiction" involving the joinder of third parties to an action as well.[285] The Report pointed out that in *Owen Equipment & Erection Co. v. Kroger*,[286] the Court had stated that the problem of pendent claim jurisdiction in *Gibbs* and that of ancillary jurisdiction over the third party claims before the Court in *Owen Equipment* were "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?"[287] But just as the proponents of the minimal diversity thesis have relied too much on the formal presence of diverse citizenship between any two adverse parties in an action containing multiple claims, so the proponents of the supplemental jurisdiction thesis have erred in their assumption that the presence of some sort of transactional relationship among non-diverse state law claims removed and consolidated with a

282. *See supra* notes 279–81 and authorities cited therein.

283. *See supra* note 277.

284. *Gibbs* more precisely required that the jurisdictional and non-jurisdictional claims arise out of a "common nucleus of operative fact" for the assertion of pendent claim jurisdiction, a test that the courts have since tended to equate with the "same transaction or occurrence" language of Rule 20 and other joinder provisions of the Federal Rules. *See, e.g.*, Penobscot Indian Nation v. Key Bank of Me., 112 F.3d 538, 563–64 (1st Cir. 1997); Hapgood v. City of Warren, 127 F.3d 490, 494 (6th Cir. 1997); Ambromovage v. United Mine Workers of Am., 726 F.2d 972, 989–90 (3d Cir. 1984).

285. ALI REPORT, *supra* note 1, §5.03, at 258.

286. 437 U.S. 365 (1978).

287. *Id.* at 370.

pending federal action automatically should be held to satisfy the requirements of supplemental jurisdiction.

This difficulty is more fundamental than the fact that, at the time of removal and before consolidation, state law actions or claims between non-diverse citizens lie outside the scope of Article III, even assuming that they might fall within federal supplemental jurisdiction after they have been consolidated with actions or claims that do fall within Article III.[288] Beyond this, the ALI proposal may have stretched the *Gibbs*'s "common nucleus of operative fact" standard to or beyond the breaking point by requiring only that a non-diverse state law action arise—not from a "common nucleus of operative fact" such that a plaintiff would be expected to try all of her claims in one action, as specified by *Gibbs*—but merely from the same "series of transactions or occurrences" as a pending federal action.[289] Even more fundamentally, however, the proposal erroneously interpreted the Supreme Court's decisions to have endorsed a "transactional" approach to supplemental jurisdiction not only in the pendent claim context at issue in *Gibbs*, but also as to exercises of pendent party and ancillary jurisdiction.[290] In fact, the Court's post-*Gibbs* decisions went out of their way to reserve that question, and to emphasize that it raised important questions regarding the limits of Article III.[291]

In *Owen Equipment*, the Court declined to determine whether the issues of federal jurisdiction in the two contexts should be treated in the same way. Instead, the Court rested its holding solely on statutory grounds, concluding that Congress had not authorized the federal courts to entertain direct claims by the original plaintiff against a non-diverse third party defendant because that would threaten the complete diversity requirement of the diversity statute as interpreted in *Strawbridge v. Curtiss*.[292] In reaching that conclusion, the Court simply assumed that there was constitutional power to entertain all of the claims, and expressly declined to decide "whether there are any principled differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences."[293] Moreover, the Court pointed out that the resolution of a third party complaint has a far closer relationship to the original action than do independent claims voluntarily joined by the plaintiff based on a transactional relationship among them: "A third-party complaint depends at least in part upon the resolution of the primary lawsuit.

288. *See* Steinman, *supra* note 107, at 756–59 (discussing this difficulty).
289. *See supra* text accompanying notes 32–56.
290. *See supra* note 285.
291. *See infra* text accompanying notes 292–302.
292. Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 380–81 (1978).
293. *Id.* at 370 n.8.

Its relation to the original complaint is thus not mere factual similarity but logical dependence."[294]

The Court's treatment of what, before the enactment of the supplemental jurisdiction statute,[295] was termed "pendent party" jurisdiction over claims by or against additional plaintiffs or defendants joined in the original complaint, was similarly circumspect. In *Moore v. County of Alameda*,[296] the Court held that the district court's refusal to entertain a pendent party claim against a county defendant in an action against local law enforcement officials under 41 U.S.C. § 1983 was not an abuse of discretion in light of the likelihood of jury confusion. Accordingly, the Court found it unnecessary to resolve the scope of constitutional power of the federal courts over such claims, noting that "there is a significant difference" between the pendent claim jurisdiction at issue in *Gibbs* and pendent party jurisdiction which "would require us to bring an entirely new party" into the litigation.[297] Even though most circuits had endorsed such pendent party jurisdiction, the Court cautioned that "[w]hether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far-reaching implications."[298]

The Court followed the same cautionary approach in *Aldinger v. Howard*,[299] which rejected the assertion of pendent party jurisdiction in a section 1983 action on statutory grounds. The Court again found it unnecessary to decide whether there was any "principled distinction" between pendent claim and pendent party jurisdiction, and declined to reach the constitutional issue. However, it pointedly observed that despite the gains in judicial economy that might be achieved by the assertion of pendent party jurisdiction in such cases, the addition of a completely new party to the federal action without any independent basis of federal jurisdiction raised significantly federalism concerns. The Court stated that "we believe that it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction."[300]

Finally, in *Finley v. United States*,[301] the Court again rejected an assertion of supplemental jurisdiction against additional non-diverse de-

294. *Id.* at 376.
295. 28 U.S.C. § 1367 (2000).
296. 411 U.S. 693, 716–17 (1973).
297. *Id.* at 713.
298. *Id.* at 715.
299. 427 U.S. 1, 18–19 (1976).
300. *Id.* at 18.
301. 490 U.S. 545, 555–56 (1989).

fendants in a Federal Tort Claim Act action against the United States, even though the federal courts had exclusive jurisdiction over the FTCA claims and the entire action therefore could be litigated only in federal court. The Court ruled that Congress had not authorized the exercise of such pendent party jurisdiction, which involved a significant expansion of the jurisdiction of the federal courts. Once again, therefore, the Court had no occasion to address the limits that Article III might place on the exercise of supplemental jurisdiction in cases where it has been authorized by Congress.[302]

Of course, the 1990 supplemental jurisdiction statute resolved the issue of statutory authority raised by *Finley* by expressly authorizing federal courts to exercise supplemental jurisdiction over all claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III"[303]—subject to exceptions designed at least partially to preserve the complete diversity requirement that the drafters of the Multiparty, Multiforum Act and the proposed class action jurisdiction legislation now propose to eliminate.[304] However, it would be mistaken to assume that the enactment of the supplemental jurisdiction statute resolves more than the issue of statutory authorization or answers the questions about the constitutional scope of pendent party and ancillary jurisdiction that the Supreme Court refused to decide in the decisions reviewed above. Specifically, nothing in the supplemental jurisdiction statute resolves when non-diverse state law claims are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III."[305] And although it may be tempting to assume that the required relationship is that prescribed by *Gibbs* in the pendent party as well as pendent claim contexts, that assumption is unjustified.

Courts applying the *Gibbs* doctrine have tended to equate that decision's "common nucleus of operative fact" standard for pendent claim jurisdiction with the transactionally based standard for joinder of parties

302. The Court simply assumed, without deciding, that had Congress authorized the exercise of such jurisdiction, it would have been constitutional. *Id.* at 549. The Court noted, however, that unlike cases of ancillary jurisdiction in which an additional party has a claim on assets within the court's control, "we have never reached such a result [involving claims against an additional party] solely on the basis that the *Gibbs* test has been met." *Id.* at 551.

303. 28 U.S.C. § 1367(a) (2000).

304. *Id.* § 1367(b). As it turned out, drafting oversights and errors have created ongoing controversy about the extent to which the "exceptions" have in fact preserved the complete diversity requirements as the drafters apparently intended. *See* authors cited at *supra* note 54.

305. § 1367(a).

and claims that pervades the FRCP.[306] As it has evolved from the tight factual relationship among claims between two parties involved in *Gibbs* to the looser concept of a single "transaction" or "series" of transactions or occurrences uniting claims between different parties under the FRCP, however, the supplemental jurisdiction doctrine has lost touch with its origins. That evolution has been entirely understandable. Courts have undoubtedly tended to equate the *Gibbs* "common nucleus" standard with the loose transactional standard of the FRCP because of the difficulty of establishing any clear line of demarcation between the two. More fundamentally, however, *Gibbs*'s references to the efficiency-based justification for pendent claim jurisdiction[307] play naturally into the efficiency orientation of the transactionally based joinder provisions of the FRCP. The clearest expression of this principle lies in the ALI's complex litigation proposal, which invoked just that justification for its proposed enlargement of federal jurisdiction to encompass not only claims between non-diverse parties asserted within a single diversity action, but also state court proceedings in which no diversity of citizenship existed at all, provided those proceedings arose out of the same transaction or occurrence as a pending federal proceeding and involved a common question of fact.[308] That development rests on a fallacious premise. The transactionally based joinder provisions of the federal rules—particularly as very liberally interpreted by the federal courts[309]—are designed to achieve judicial and litigant economy within a single system of courts. They have no express or implicit relationship to the limits of Article III.

Contrary to the presuppositions of the enacted and pending federal jurisdiction revision proposals, efficiency-based considerations alone do

306. *See, e.g.*, FED. R. CIV. P. 13(g) (authorizing joinder of cross claims between co-parties that arise out of the same transaction or occurrence as the original action); FED. R. CIV. P. 14(a) (authorizing a plaintiff to assert a claim against a third party defendant that arises out of the same transaction or occurrence as plaintiff's original claim against the defendant); FED. R. CIV. P. 20(a) (authorizing the joinder of parties plaintiff or defendant in the original complaint where the claims by or against them arise out of the same transaction or occurrence or "series" of transactions or occurrences and involve a common question of law or fact). *See also supra* note 284.

307. In its discussion of judicial discretion to exercise or decline pendent claim jurisdiction where the power to do so exists the Court observed

> [t]hat power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims . . . .

United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

308. *See supra* text accompanying notes 32–56.

309. Under the prevailing view, claims satisfy the "same transaction" standard if they are "logically related" to each other in a way that will achieve some judicial economy, even if they involve significant legal and factual differences. *See* 13 WRIGHT ET AL., *supra* note 116 § 3523, at 94–96.

not provide an adequate basis for the assertion of federal jurisdiction over claims that do not satisfy the requirements of Article III.[310] The suppositions of the Framers were the opposite, as evidenced by the early enactment of the Anti-Injunction Act prohibiting federal court injunctions against state judicial proceedings regardless of whether they involved duplicative relitigation of facts and issues pending in a parallel federal case.[311] In interpreting the Act in its current form, Justice Black pointed out that "from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions."[312] This expectation and tolerance of overlapping and duplicative federal/state litigation involving the same subject matter was not simply a matter of statutory policy, but "rests on the fundamental constitutional independence of the States and their courts . . . ."[313]

The proper guide to the joinder of jurisdictional and non-jurisdictional parties and claims in a federal court is whether the assertion of such jurisdiction is "necessary and proper" to permit the federal courts to exercise the jurisdiction assigned to them by the Constitution. Just as the Anti-Injunction Act recognizes that a federal court may enjoin state court proceedings whenever that is "necessary in aid of its jurisdiction" or to "protect or effectuate its judgments,"[314] so a federal court must have the power—if authorized by Congress[315]—to entertain or remove from state court non-jurisdictional claims where that is necessary to permit the court to render an effective judgment or prevent its judgments from prejudicing, legally or practically, the rights of non-parties or of those before the court.[316] Even an appropriately demanding necessary and proper standard of review in this context so vital to the federal state

310. *See, e.g.*, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 123 (1984); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909); John P. Dwyer, *Pendent Jurisdiction and the Eleventh Amendment*, 75 CAL. L. REV. 129, 154 (1987); Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after* Pennhurst v. Halderman, 12 HASTINGS CONST. L.Q. 643, 660 (1985) ("No matter how great the efficiency justification for pendent jurisdiction, it cannot be allowed if not authorized by the Constitution and the [jurisdictional] statute.").

311. The Anti-Injunction Act was first enacted on March 2, 1793, and provided, "nor shall a writ of injunction be granted to stay proceedings in any court of a state." Act of March 2, 1973, ch. 22, § 5, 1 Stat. 335 (1793).

312. Atl. Coast Line R.R. v. Bd. of Locomotive Eng'rs, 398 U.S. 281, 286 (1970).

313. *Id.* at 287.

314. 28 U.S.C. § 2283. The Act also authorizes federal court injunctions of state judicial proceedings where "expressly authorized by Act of Congress." That exception cannot be taken to expand federal judicial power beyond injunctions that are necessary to its exercise under the necessary and proper analysis discussed in the text.

315. *See* Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28, 32 (2002).

316. *See supra* text accompanying notes 95–100, 264–68.

balance[317] would not impose any standard of strict "necessity" on Congress, or make efficiency considerations irrelevant to the scope of federal judicial power. Those considerations would be relevant, however, only insofar as they bore on the ability of parties possessing claims falling within the scope of Article III to invoke federal court jurisdiction, or of the federal courts effectively to exercise jurisdiction over such claims. It is one thing to authorize the consolidation in federal court of claims where that is necessary to permit the court fairly and efficiently to resolve a federal question or diversity claim properly before it. It is quite another to authorize a federal court to entertain non-diverse state law claims because of the perceived inadequacies and inefficiencies of state courts. The first objective falls well within a necessary and proper implementation of Article III. The second does not.

2. *The Validity of Current and Proposed Exercises of Supplemental Jurisdiction Under a Necessary and Proper Model of Federal Jurisdiction*

The joinder of non-diverse state law claims with diversity claims under the current joinder provisions of the federal rules, provided they arise out of the same transaction or occurrence as the jurisdictional claims with which they are joined, is consistent with a necessary and proper model of federal jurisdiction. By contrast, many of the provisions of the enacted and proposed federal jurisdiction expansion legislation are inconsistent with necessary and proper limits on federal court jurisdiction.

The current enactments and proposals for federal jurisdiction expansion are based on general notions of the inadequacy of justice rendered by state courts, and of the need to achieve judicial economy in multiple cases involving similar claims arising out of transactionally related circumstances.[318] No logical or dependent relationship of the kind involved in historic equitable joinder practice or under Rules 14, 19, or 24 is required.[319] In this setting, the permissibility of exercising supplemental jurisdiction over non-diverse claims by or against parties permissively joined under Rule 20, or asserted in the context of a class action under Rule 23(b)(3), arguably provide more pertinent analogies.

Rule 20 authorizes the joinder of claims by or against multiple plaintiffs or defendants where those claims arise out of "the same transaction, occurrence, or series of transactions or occurrences and if any question of

317. *See supra* text accompanying notes 156–64.

318. *See supra* Part I.

319. *See* FED. R. CIV. P. 14 (governing impleader); FED. R. CIV. P. 19 (governing necessary and indispensable parties); FED. R. CIV. P. 24 (governing intervention). *See also supra* note 117.

law or fact common to all defendants will arise in the action."[320] In the diversity context, the supplemental jurisdiction statute expressly excludes the joinder of claims against non-diverse defendants under Rule 20 supplemental to the exercise of jurisdiction over a transactionally related claim against a diverse defendant,[321] but omits mention of claims joined by both diverse and non-diverse plaintiffs against a single defendant having the required transactional relationship.[322] This omission—apparently the result of a drafting oversight[323]—has led to an unresolved conflict of authority in the courts of appeals over whether the statute authorizes the exercise of supplemental jurisdiction over claims asserted by non-diverse plaintiffs in cases in which some plaintiffs are of diverse citizenship from the defendant.[324] Although substantial arguments exist on both sides of this issue, the assumption of all of the opinions addressing the question to date is that the question is purely a matter of statutory interpretation and raises no question of constitutional dimension.

Is this assumption—that Congress may abrogate the complete diversity requirement in the context of Rule 20 permissive joinder based on a simple transactional relationship among claims—justified? Such a conclusion would find little support in the historic model, which based equitable joinder of claims on a joint, logical, or dependent relationships among them.[325] For the reasons already discussed, however, the necessary and proper model of federal jurisdiction does provide significant support for the idea that claims voluntarily joined by diverse and non-diverse plaintiffs against a single defendant, or by a single plaintiff against both diverse and non-diverse defendants, arising out of the same or a series of related transactions and occurrences, should fall within the supplemental jurisdiction of the federal courts to avoid deterring the use of the federal forum by the intended beneficiaries of the Diversity Clause.[326] No similar "deterrence" rationale supports many of the more expansive provisions of the enacted and proposed federal jurisdiction legislation. This particu-

320. FED. R. CIV. P. 20(a).

321. *See* 28 U.S.C. § 1367(b) (2000) (excluding from supplemental jurisdiction in diversity cases claims "by plaintiffs against persons made parties under Rule . . . 20").

322. *See* § 1367(b).

323. *See* Rowe, *supra* note 54, at 961 n.91; Thomas D. Rowe, Jr. et al., *A Coda on Supplemental Jurisdiction*, 40 EMORY L.J. 993 (1991); Pfander, *supra* note 54, at 145 n.132.

324. *See, e.g.*, Rosmer v. Pfizer, Inc., 263 F.3d 110, 122 (4th Cir. 2001) (upholding supplemental jurisdiction in class action context); Leonhardt v. W. Sugar Co., 160 F.3d 631, 640–41 (10th Cir. 1998) (rejecting supplemental jurisdiction over diversity claim failing to satisfy jurisdictional amount); Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 931–32 (7th Cir. 1996) (holding *contra* to *Leonhardt*); Free v. Abbott Labs. (In re Abbott Labs.), 51 F.3d 524 (5th Cir. 1995) (upholding supplemental jurisdiction in class action context). *See also* Pfander, *supra* note 54, at 154–60.

325. *See supra* text accompanying notes 114–30.

326. *See supra* text accompanying notes 258–59.

larly is true of those relating to the removal of class actions involving diverse claims from state to federal court by in-state defendants or plaintiffs, the removal of actions based on the citizenship of purported class members or represented parties that have not been certified as class actions, and the removal of stand-alone state court actions involving no diversity of citizenship at all.[327]

Class actions maintained under Rule 23 where not all named representatives or members of the class are diverse from the defendants present more difficulty of analysis and offer a superficial analogy to the pending class action jurisdiction legislation. Under traditional analysis, only the named class representatives need be of diverse citizenship from the defendants.[328] The citizenship of the members of the class is disregarded for the purpose of determining whether the "complete diversity" requirement is satisfied.[329] To the extent the class judgment is binding on the members of the class, the court's jurisdiction to affect their rights is viewed as "ancillary" to that over the claims of the named representatives.[330] In the leading decision, *Supreme Tribe of Ben Hur v. Cauble*,[331] the U.S. Supreme Court upheld the binding effect of a judgment in a federal court class action commenced by members of an Indiana fraternal benefits association who were of diverse citizenship from the defendant, seeking injunctive relief against a planned reorganization of the association, upon the rights of class members who were citizens of Indiana. The Court stated that the district court had jurisdiction "ancillary" to that over the claims of the diverse class representatives to determine the rights of the non-diverse members of the class. In sustaining the district court's jurisdiction, the court followed an historic model similar to that suggested above:

> It is true that jurisdiction, not warranted by the Constitution and laws of the United States, cannot be conferred by a rule of court, but class suits were known before the adoption of our judicial system, and were in use in English chancery. . . .
>
> . . . Owing to the number of interested parties and the impossibility of bringing them all before the court, the original suit was peculiarly one which could only be prosecuted by a part of those interested in suing for all in a representative suit. Diversity of citizenship gave the District Court jurisdiction. Indiana citizens were of the class represented; their rights were duly represented by those before the court. The inter-

327. *See supra* text accompanying notes 242–46, 211–41, 261–63.

328. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365–67 (1921); 7A WRIGHT ET AL., *supra* note 116, § 1755.

329. *Id.*

330. *See infra* text accompanying notes 331–32.

331. 255 U.S. 356, 366–67. *See also* Stewart v. Dunham, 115 U.S. 61, 64 (1885).

> vention of the Indiana citizens in the suit would not have defeated the jurisdiction already acquired. Being thus represented, we think it must necessarily follow that their rights were concluded by the original decree.[332]

Several aspects of *Ben Hur* suggest that it should not be read as a categorical endorsement of federal jurisdiction based on the "minimal diversity" of a single class member from one defendant as proposed by the class action jurisdiction legislation. First, as the quoted language suggests, the Court followed the long-standing view that the true "parties" before the court for the purpose of determining diversity of citizenship were the named class representatives, not the members of the class themselves, who were concluded, not because they were parties themselves, but because they were represented by those who were.[333] Even today, considerable authority supports the view that unnamed class members are not full parties to the action before the court, although their rights may be concluded by the decree.[334] Second, *Ben Hur* was not concerned with the typical "common question" class action that is the subject of the proposed class action legislation, but rather with an historically recognized "true" class action which sought to enjoin the disposition of funds of an association in which the absent class members were alleged to possess a joint interest.[335]

More generally, *Ben Hur* was a case of the kind described in Rule 23(b)(1) governing modern class action practice in the federal courts. That subdivision authorizes class action certification where the due-

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332. *Supreme Tribe of Ben-Hur*, 255 U.S. at 366 (internal citations omitted).

333. *See* HOPKINS, *supra* note 116, at 239–40 (Equity Rule 38, 1912) ("When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.").

> Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and defendants in the suit properly before it.

Id. at 104–05 (Equity Rule 48, promulgated Mar. 2, 1842).

> Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it.

Id. at 52 (Equity Rule 48, 1822).

334. *See supra* text accompanying notes 202–10.

335. 255 U.S. at 361. As the Court observed in *Ben-Hur*:

> The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree.

Id. at 367.

process based commonality, typicality and adequate representation requirements of Rule 23(a) are satisfied and where the prosecution of separate actions by or against individual class members would risk establishing inconsistent standards of conduct with respect to the members of the class or would, as a practical matter, impair their ability to protect their rights.[336] That category of class actions has direct antecedents in class action practice in the courts of equity at the time the Constitution was adopted.[337] It also has strong ties to the joinder provisions of Rules 19 and 24, which find support in a necessary and proper model of federal jurisdiction by permitting the joinder in a single action of both jurisdictional and non-jurisdictional claims where that is necessary to permit the court to accord complete relief or to avoid prejudice to the rights of either absentees or the parties before the court resulting from the court's decree.[338]

The class action provision most relevant in the present context, however, is Rule 23(b)(3), which authorizes a federal class action to be maintained whenever the requirements of Rule 23(a) are satisfied and the court finds that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[339] As the advisory committee notes to the 1966 amendments of Rule 23, which introduced this provision, recognize, the Rule 23(b)(3) "common question" class action had no clear lineage, either in English equity practice[340] or in pre-1966 class

336. FED. R. CIV. P. 23(b)(1).

337. *See supra* text accompanying notes 119–30.

338. For a discussion of historic equitable class action practice, *see supra* text accompanying notes 115–30. The Advisory Committee for the 1966 amendments to Rule 23 specifically tied the provisions of Rule 23(b)(1) to the corresponding provisions of Rules 19 and 24. *See* FED. R. CIV. P. 23 advisory committee notes (1966).

In the same way, maintenance of class actions under Rule 23(b)(2) on the ground that the party opposing the class has taken actions "generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole," even absent complete diversity of citizenship between all class members and the defendants, also derives support from the necessary and proper model of federal judicial jurisdiction. In such a situation, the court's decree either will, as a practical matter, be applied equally to all members of the class—as, for example, in a civil rights action seeking injunctive relief against racial discrimination in the hiring or education of members of the plaintiff class—or, if it is not, will create clear inequities among similarly situated members of the class. Congress and the rules drafters acted well within the boundaries of a necessary and proper model of federal jurisdiction in promulgating Rule 23(b)(2) to prevent such impairment of the rights of absent parties or inequities among the members of the class as a result of a federal court decree. In many of its applications, moreover, Rule 23(b)(2) is simply a specific example of the class actions covered by Rule 23(b)(1), and thus has strong historic antecedents as well.

339. FED. R. CIV. P. 23(b)(3).

340. *See supra* text accompanying notes 119–30.

action practice in the federal courts.[341] Rather, such actions, to the extent they previously were permitted at all, were viewed as "spurious" class actions that would not conclude the members of the "class" unless they chose to intervene in the action as parties following the rendition of a final decree.[342] Moreover, unlike the other provisions of Rule 23, which were designed to prevent practical prejudice and unfairness to either existing parties or the absentees as a result of the court's decree, and drew upon historic practice in that respect, Rule 23(b)(3) was acknowledged to be an innovation in which

> class action treatment is not as clearly called for as in those [cases] described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.[343]

Under a "necessary and proper" model of federal jurisdiction, the primary emphasis of the rule on achieving judicial economy by resolution of such transactionally related claims on a class-wide basis provides weak support for an expansion of federal jurisdiction.[344] Viewed in another light, however, Rule 23(b)(3) could be characterized as nothing more than a permissive joinder device. Because of its requirement that all class member be accorded individual notice of the pendency of the action and an opportunity to opt out,[345] class members have the opportunity to decline to participate if they wish. Viewed in this way, the considerations supporting the permissive joinder provisions of Rule 20 for claims arising out of the same transaction or occurrence under a necessary and proper model of federal jurisdiction—particularly the consideration that plaintiffs possessing claims independently falling within the subject matter jurisdiction of the federal court may be deterred from enforcing their rights in that forum if they are not able to join their claims with those of other, similarly situated litigants[346]—would apply equally to the permissive joinder authorization of Rule 23(b)(3). In fact, a strong undercurrent of the

341. FED. R. CIV. P. 23 advisory committee note on subdivision (b)(3)(1966).

342. *Id.*

343. *Id.*

344. *See supra* text accompanying notes 308–13.

345. *See* FED. R. CIV. P. 23(c)(2).

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each class member that (A) the court will exclude the member from the class if the member so requests by a specified date . . . .

Id.

346. *See supra* text accompanying notes 258–59, 326.

1966 amendments adding Rule 23(b)(3) was the concern that absent such an authorization, claims independently falling within the subject matter jurisdiction of the federal court might prove to small to be viable in individual actions.[347] Even assuming that absent class members were, contrary to settled historic practice,[348] regarded as "parties" for the purpose of determining diversity of citizenship, such an argument for entertaining their claims ancillary to the claims of diverse parties properly before the court would satisfy the requirements of a necessary and proper model of the federal diversity jurisdiction. But the expansive removal provisions of the proposed class action jurisdiction legislation cannot similarly be supported. Those provisions do not provide a device for voluntary joinder of multiple claims arising out of the same transaction in federal court, thus removing an impediment to the invocation of the diversity jurisdiction by its intended beneficiaries. Rather, in many of their applications, they provide a mechanism for in-state citizen defendants to defeat the plaintiffs' chosen state forum. Similarly, the Multiparty, Multiforum Act's provision for removal of stand-alone state court actions in which no plaintiff asserts a claim falling within the federal diversity jurisdiction draws no support from such a necessary and proper "deterrence" rationale.

CONCLUSION

Whether viewed in terms of "minimal diversity" or of "supplemental jurisdiction," the test for joining diversity or other claims falling within the scope of Article III with state law claims that do not should be the same. Where Congress undertakes to assign to the federal courts jurisdiction over non-diverse state law claims asserted or consolidated in an action together with claims falling within the scope of Article III, those non-jurisdictional claims should be held to fall within the scope of the federal judicial power only if it is "necessary and proper" for the federal courts to entertain them to achieve the purposes of the constitutional grant.

Because a vital aspect of the balance between federal and state judicial power established by the Constitution is at stake, such a necessary and proper analysis should focus on real, rather than imagined, congres-

347. *See* FED. R. CIV. P. 23 advisory committee's note on subdivision (b)(3).

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.

Id.

348. *See supra* notes 203–04, 328.

sional reasons, and should require a discernable connection between legitimate Article III ends and the specific expansions of federal jurisdiction at issue. Viewed in this light, neither the formal presence of "minimal diversity" somewhere in an aggregated group of claims, nor the formal presence of some sort of "transactional relationship" among them, should in itself suffice to sustain the assertion of federal jurisdiction over non-diverse state law claims without further consideration of the context in which their joinder arose and the purposes that it serves. In this respect, all of the federal jurisdiction expansion enactments and proposals are deficient, because they proceed on the assumption that finding such a "minimal diversity" or transactional "hook" to a jurisdictional claim satisfies the requirements of Article III without further inquiry. That assumption, based on extensions of *Tashire* and *Gibbs* to entirely new contexts which they neither considered or resolved, should be rejected.

Adoption of a necessary and proper model of federal jurisdiction would not unduly confine Congress or the rules drafters in shaping an enlightened system for joinder of parties and claims. Considerations of judicial economy are not irrelevant to an appropriate necessary and proper analysis. To the extent that they bear an achieving the purposes of the Diversity Clause, as they frequently may do, Congress or the rules drafters may take them into account. If the diseconomy of separately litigating jurisdictional and non-jurisdictional claims might bear significantly on the willingness and ability of the intended beneficiaries of the Diversity Clause to invoke the protection of the federal court, rules of party and claim joinder properly may eliminate those obstacles to the invocation of a federal forum. Many provisions of the current federal rules, such as Rule 20's provision for joinder of multiple plaintiffs and defendants in a single complaint based on a transactional relationship among claims, may be supported on that ground.

Moreover, significant aspects of the jurisdiction expansion enactments and proposals, such as permitting the assertion of original jurisdiction, or the removal by a non-citizen defendant, of an entire action where only some claims in the action are between parties of diverse citizenship, satisfy the requirements of such a necessary and proper analysis. *Strawbridge v. Curtiss* is not cast in constitutional stone. Congress rationally could conclude that an out-of-state citizen in a state court action that also involves non-diverse claims would suffer prejudice if forced to litigate in the courts of the state, and rationally could provide for the removal of the entire action in order to preserve, to the extent possible, the plaintiff's joinder choices. Similarly, Congress could seek to facilitate access to federal court by the intended beneficiaries of the Diversity Clause by

providing that a party possessing a diversity claim might join non-diverse claims by or against other plaintiffs or defendants arising out of the same transaction in the same federal action.

In other important respects, however, the enacted and proposed jurisdiction expansion legislation raises significant questions, both of validity and policy. To the extent they baldly are predicated on the need to achieve judicial and litigant economy and consistent outcomes between federal and state litigation arising from the same events or transactions, the proposals on their face seek to achieve ends that are unrelated to the purpose of the Diversity Clause. This is most apparent with respect to the removal provisions of the ALI's complex litigation proposal and the Multiparty, Multiforum Act, which explicitly are based on judicial economy considerations, and which would permit removal of state law actions in which no diversity of citizenship at all is present merely because they possess a "transactional relationship" with a pending federal action.

The proposed class action fairness legislation stands perhaps on firmer ground, particularly in its proposal for removal of state court class actions by a member of the plaintiff's class where a substantial number of the members of the class are of diverse citizenship from any defendant. Perhaps in that circumstance, at least where the diverse class members are not citizens of the state from which removal is sought, Congress might rationally conclude that out-of-state class members would be prejudiced by being forced to litigate in a defendant's home court—if one puts aside the fact that the named class representative has chosen to litigate in the courts of that state on behalf of the class. Similarly, an out-of-state defendant in such a class action who is of diverse citizenship from some class representatives or class members would be entitled to the protections accorded by the Diversity Clause.

But in other important applications, the class action fairness proposal fails to satisfy the requirement for a discernable tie between the purposes of Article III and its expansive jurisdictional provisions. This surely is true of the provision for removal by any in-state citizen defendant, or any in-state citizen class member, of an entire class action in which there is any diversity of citizenship between any class member and any defendant—even taking account of the currently proposed restriction preventing removal where two thirds of the class members and the primary defendants are citizens of the state in which the action originally was filed. Even more obviously, significant concerns are presented by the provisions for removal of an action which has not been certified as a class action, or which is not a class action at all, provided that some members of the proposed class or some non-parties on whose "behalf" the suit is

brought, may be of diverse citizenship from any defendant—without regard to the citizenship of the removing defendant.

Perhaps Congress and other proponents of the current proposals for federal jurisdiction expansion on the basis of "minimal diversity" could provide satisfactory answers to the questions raised in this article regarding these and other questionable aspects the proposals when viewed in terms of the purposes of the Diversity Clause. They have not done so because of the erroneous assumption that a minimal diversity "hook" is all that is required to permit the aggregation of non-diverse state law claims in federal court to achieve unrelated ends. More should be required before the vast expansion of federal court jurisdiction that these proposals seek to accomplish is determined to be "necessary and proper" to achieve the purposes of Article III.

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